United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-7102

UNITED STATES COURT OF APPEALS
FILED
MAY 7 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiff-Appellant,

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

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PORTIONS OF THE RECORD CITED
IN PLAINTIFF-APPELLANT'S BRIEF

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R E C O R D

In accordance with the Order of the Honorable William H. Timbers, dated March 25, 1976, Plaintiff-Appellant has compiled and photocopied those parts of the record she has relied upon in her accompanying brief. Four copies of this "record" are filed with the Court and a copy is being served on each opposing party.

The papers of the original documents have been renumbered as follows:

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U.S. DISTRICT COURT
FILED
FEB 27 1976
S.D. OF N.Y.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiff,

- against -

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services, JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

- X

75 Civ. 4682 (WCC)

MEMORANDUM AND ORDER

A P P E A R A N C E S :

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to help such parents or relatives to attain

CONNER, D. J.:

Plaintiff Josephine McGraw and her nine dependent children are recipients of public assistance benefits under the Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. § 601 et seq. The individual defendants are public officials legally responsible for administration of the AFDC program in New York. AFDC is among the categorical assistance programs established under the Social Security Act and is financed by the Federal Government and participating States on a matching-fund basis.

The present action represents a challenge to the validity and continued enforcement of 18 New York Code of Rules and Regulations § 352.31(d)(1)(ii)[1/] (the New York regulation). That challenge extends to so much of the New York regulation as authorizes the defendant New York State Department of Social Services (the State agency) to recoup a past AFDC grant overpayment -- where such overpayment is not occasioned by the recipient's wilful act or omission -- from what is commonly denominated as an earned income "disregard."

I.

Alleging that the New York regulation stands in contravention of the Social Security Act and operates in derogation of due process and equal protection under the Fourteenth

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Amendment, plaintiff brought this suit for a declaratory judgment and preliminary and permanent injunctions pursuant to 28 U.S.C. §§ 2201 and 2202, Rule 57 F.R.Civ.P. and 42 U.S.C. § 1983. Because plaintiff's constitutional claims, whatever their ultimate merits, are at the least arguable, this Court concludes that it has subject matter jurisdiction under 28 U.S.C. § 1343(3) and therefore may consider the pendent statutory claim, United Mine Workers v. Gibbs, 383 U.S. 715 (1966), without need to convene a three-judge court unless the statutory claim proves not to be dispositive. Hagans v. Lavine, 415 U.S. 528 (1974).

At a pretrial conference addressed to plaintiff's motions for a temporary restraining order,[2/] preliminary injunction, and class action certification, this Court determined that, in the absence of issues of material fact demanding an evidentiary hearing or trial, the parties' paper submissions would be treated as applications for summary judgment under Rule 56, F.R.Civ.P., allowing for plenary relief on the merits. The parties therefore were directed to file a statement of agreed facts pursuant to Rule 9(g) of the General Rules of this Court.

As the parties were advised at their conference with this Court, the class action designation sought by plaintiff would constitute, at best, procedural surplusage. This is not to say that the Court entertains any doubt that

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plaintiff might adequately represent the interests of those welfare recipients who, like herself, are immediately and intimately affected by the recoupment of agency overpayments from earned income disregards. Nor does the documentation supplied by the parties leave any basis for questioning the numerosity of a class that would consist of plaintiff and others similarly situated with respect to the issues presently before the Court.

Nonetheless, within the frame of the present case, certification of class action status would add no force to the prospective effects of a declaratory judgment and could not serve to implement any meaningful retroactive relief in which members of such a class might share: under the ruling of Edelman v. Jordan, 415 U.S. 651 (1974), this Court is without power to award welfare benefits retroactively. The Court thus declines to certify this action under Rule 23(c) F.R.Civ.P.

II.

For the sake of clarity, the issues involved in this action are, in the discussion that follows, raised in relief from the background of plaintiff's personal welfare case history. Mrs. McGraw and her family have received semi-monthly AFDC payments for an unspecified number of years. Unemployed when she first became an AFDC recipient, Mrs. McGraw

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secured a job as a cook's helper more than three years ago, an employment that she has retained to date. Throughout that same period, the McGraw family has continued to receive AFDC assistance as a supplement to Mrs. McGraw's earned income.

In the fixing of AFDC benefits to be paid to the McGraws, the key point of reference is the "standard of need," an amount calculated by the State to be necessary to sustain a family of the McGraws' size; federal law itself neither prescribes the components nor targets the level of such standards. As the Supreme Court has recently observed,

> "Under [the] HEW regulations [that implement Title IV,] * * * [b]oth eligibility for AFDC assistance and the amount of benefits to be granted an individual applicant are based on a comparison of the State's standard of need with the income and resources available to that applicant. 45 C.F.R. § 233.20(a)(2)(i). The 'income and resources' attributable to an applicant * * * consist generally of 'only such net income as is actually available for current use on a regular basis * * * and only currently available resources.' 45 C.F.R. § 233.20(a)(3)(ii)(c). * * * . If, [after consideration of certain deductions and exemptions], the net amount of 'earned income' is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference. 45 C.F.R. § 233.20 (a)(3)(ii)(a) and (c)." Shea v. Vialpando, 416 U.S. 251, 253-54 (1974).

The difference between the applicable standard of need and the AFDC recipient's "income and resources" is

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FOOTNOTES

observation that "[t]he work incentive program

commonly referred to as the "budget deficit." When Mrs. McGraw became a wage earner, her family's own budget deficit was thereby affected in two ultimately measurable respects, in accordance with the commands of Section 402(a)(7) and (8) of the Social Security Act, 42 U.S.C. § 602(a)(7) and (8). The relevant portions of those clauses read as follows:

> "§ 602.
> (a) A State plan for aid and services to needy families with children must * * * (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid * * * ; (8) provide that, in making the determination under clause (7), the State agency --
>
> (A) shall with respect to any month disregard --
>
> * * *
>
> (ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual * * * whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month * * * ."

Thus, by operation of Section 402(a)(7), the McGraws' budget deficits -- and the AFDC grants based upon them -- have been necessarily reduced by the fact of an income regularly generated by Mrs. McGraw's employment. However, by force of Section 402(a)(8), the consequent reductions are, again necessarily, limited by the "$30 and 1/3" disregards.

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It is something of a puzzlement that plaintiff has chosen to emphasize the Williams court's observation that "[t]he work incentive program

At the end of April 1975, a notice from the New York City Department of Social Services (the City agency) advised the McGraw family that,

> "Your [semi-monthly] income from the period July, 1974 to present should have been $127.59, not $80.43 as previously budgeted. This resulted in $990.36 in overpayment for this period.
> [The New York regulation] permit[s] recoupment on amounts up to the total exempted income. Since your budget deficit is less than your exempted income your case will be suspended for 13 issue[s] until this amount is recouped."

At Mrs. McGraw's request, the State agency held a "fair hearing" for review of the City agency's intended recoupment measures. In a decision rendered on August 6, 1975, defendant Berger announced the following determinations:

1) The McGraws had received, through agency error, an AFDC overpayment.

2) That overpayment could be recouped in accordance with federal law only if the McGraws had available income and/or resources in excess of their AFDC grant.

3) Plaintiff's "$30 and 1/3" disregard represented such excess income and thus was subject to recoupment under the New York regulation.

As a result of that decision, the City agency proceeded to reduce the McGraws' semi-monthly AFDC payments by "withholding"

a portion of the earned income disregards; the agency's departure from its initial intention to suspend its payments to the McGraws remains, to date, unexplained.

Plaintiff now asks this Court to rule that, at least where overpayments have not been occasioned by the fraud of AFDC recipients, the earned income disregard established under Section 402(a)(8) stands beyond the reach of defendants' recoupment. Defendants for their part insist that a fair reading of the Social Security Act and a due deference to the policies of the Department of Health, Education and Welfare (HEW) compel the conclusion that the recoupment of disregards wholly comports with federal law.

III.

Viewed in the abstract, defendants' posture in this litigation commands a reasonable sympathy. By invoking the New York regulation at issue, defendants have sought no more than to retrieve for the unhappily finite public treasury monies received without entitlement. In drawing upon the earned income disregard for that purpose, defendants have looked to a source that, by definition, lies beyond the minimum standard established as necessary for the AFDC recipient's subsistence: in New York, AFDC grants are as a rule calculated to compensate for the recipient's entire budget deficit. Thus, even if reduced by an amount representing

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the full measure of the earned income disregard, such a grant would still raise the recipient to the level of his determined standard of need. Moreover, in effecting recoupments, defendants act under the State's regulatory admonition that "[t]he proportion of the current assistance grant that may be deducted for recoupment purposes shall be limited on a case-by-case basis so as not to cause undue hardship * * * ," 18 N.Y.C.R.R. § 352.31(d)(4).

Nevertheless, the present litigation cannot be put to rest by the mere recitation of defendants' salutary objectives. For, although "there is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits," King v. Smith, 392 U.S. 309, 318-19 (1968), it is just as certain that a participating State, under Title IV, must abide by federal directive where Congress has chosen to speak in mandatory terms. Thus, the New York regulation may be permitted to stand only if it is consistent with the congressional mandate embodied in Section 402(a)(8), i.e., that the first thirty dollars of an individual's earned income plus one-third of the remainder be disregarded in New York's "determination" of that individual's "need." See X v. McCorkle, 333 F.Supp. 1109 (D.N.J. 1970), affirmed sub nom. Engelman v. Amos, 404 U.S. 23 (1971).

It appearing from the complaint, the annexed affidavits of

Analyzed in the abstract, defendants' argument that recoupment of overpayments from earned income disregards does not offend the literal import of Section 402(a)(8) exerts a considerable force. Thus, defendants assert, the statutory disregard extends -- in terms -- no farther than the bounds of a State's "determination of need," a determination that, according to defendants, involves no more than an identification of those who are eligible for AFDC benefits and a calculation of the AFDC family's budget deficit. Once having made such a determination in accordance with, inter alia, the earned income disregard prescribed by Section 402(a)(8), the State is thereafter free, defendants emphasize, to establish its own level of benefits and, consequently, to reduce below the budget-deficit figure the amount of assistance that an AFDC family will receive. Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); see Rosado v. Wyman, 397 U.S. 397, 413 (1970). Thus, defendants reason, in its recoupment of overpayments, the welfare agency does not "determine need" when it proceeds indirectly against the already-honored disregard by adjustment of the ultimate AFDC payment.

Defendants concede that an overpayment caused other than by an AFDC recipient's fraud cannot be recouped where to do so would reduce an AFDC family's means below the level of that family's standard of need. See National Welfare Rights

Organization v. Weinberger, 377 F.Supp. 861 (D.D.C. 1974). Defendants urge, however, that the earned income disregard represents an available asset that -- at least in New York -- is in excess of the standard of need and thus is a proper source for recoupment.

Defendants' construction of Section 402(a)(8) is reinforced by the apparent support of HEW, the federal agency charged by statute with execution of the Social Security Act. To be sure, that support is not clearly reflected on the face of HEW's implementing regulations. Thus, the most pertinent of those regulations provides no more than that

> "[a]ny recoupment of overpayments permitted by paragraph (a)(12)(i)(a)(2) of this section [referring only to overpayments wilfully caused by AFDC recipients] may be made from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payment or from both." 45 C.F.R. § 233.20(a)(12)(i)(f).

However, plaintiff herself represents that, in the wake of the decision in National Welfare Rights Organization v. Weinberger, supra, "consultation between attorneys for N.W.R.O. and H.E.W. indicated that H.E.W. allow[s] the practice challenged herein." Plaintiff's Supplementary Brief at 11. It may hardly be gainsaid that HEW's acknowledged alignment with defendants' position stands as a formidable hurdle for plaintiff's case, since "the construction of a statute by those charged with its execution should be followed unless there are compelling

indications that it is wrong." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); see, e.g., New York State Department of Social Services v. Dublino, 413 U.S. 405, 421 (1973); Dandridge v. Williams, supra, at 481-482; Snell v. Wyman, 281 F.Supp. 853, 868 (S.D.N.Y. 1968), affirmed, 393 U.S. 323 (1969).

Plaintiff in effect invites this Court to conclude that an initial deference to HEW's apparent construction of Section 402(a)(8) must inevitably give way to the alleged fact of "compelling indications" that the federal agency, with respect to the issues raised herein, is simply "wrong." Plaintiff notes in passing that this Court would not be the first to refuse to adopt a stance expressly or impliedly assumed by HEW. See, e.g., Philbrook v. Glodgett, 43 U.S.L.W. 4702 (June 9, 1975); Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); National Welfare Rights Organization v. Weinberg, supra; Gasaway v. McMurray, 356 F. Supp. 1194 (S.D.N.Y. 1973).

This Court must nevertheless decline plaintiff's invitation. It does so notwithstanding the recent case of Johnson v. Likens, Civ. No. 4-75-318 (D.Minn. 1975)(unreported decision), in which the District Court of Minnesota has ruled that the statutory disregard stands protected against recoupment of agency-caused overpayments. Admittedly, Johnson is to date

disregarded income rather than part of the AFDC grant itself. Plaintiffs

the case most squarely on point,[3/] and thus its authority would ordinarily be persuasive. Nonetheless, Johnson's precedential value is seriously undermined by the clearly erroneous premises on which the Johnson court rested its decision.

Thus, for example, via a painstaking but somewhat strained analysis of HEW regulations, the Johnson court concluded that "HEW would appear not to allow recoupments from disregard income in cases of agency error or non-wilful recipient error," Id. at 35. As already indicated, it has been conceded that HEW's actual position is just the opposite.

Moreover, in its attempt to gauge the breadth of the Section 402(a)(8) reference to "determination of need," the Johnson court asserted that

> "The United States Supreme Court, in explicating § 602(a)(7) and the regulations which implement it, noted that the amount an applicant is paid is based on a § 602(a)(7) determination, and upon a determination of need. [Thus,]
>
> 'If * * * the net amount of "earned income" is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference. * * * Shea v. Vialpando * * * .'
>
> The § 602(a)(7) operation is the operation by which the amount of the assistance payment is calculated. By saying in § 602(a)(8) that the income disregard shall not be considered in the (a)(7) determination, Congress was stating that the income shall be disregarded in determining the amount of the assistance payment." Id. at 29 (citations omitted)(emphasis added).

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disregarded income rather than part of the AFDC grant itself. Plaintiffs

Such reasoning obliquely reflects a basic misapprehension of the relation between the budget deficit and the ultimate AFDC grant. The two are not, as the Johnson court apparently assumed, functionally identical -- although, as is currently true in New York, they may prove to be equivalent in amount. The budget deficit represents the "basis" of the AFDC grant only to the extent that the latter may not exceed one hundred per cent of the former, although the State may compute the grant as a lesser percentage of the budget deficit. The AFDC grant is thus a function not only of the recipient's need, but also of the administrative imperatives that may be dictated by a State's limited fiscal resources.

This is not to say that the State may circumvent the disregard mandate simply by reducing the AFDC grant to reflect a systematic and automatic subtraction of "$30 + 1/3" of earned income from the initially computed budget deficit; such operation would constitute in effect a redetermination of need without allowance for the disregard. To that extent, this Court agrees with the observation in Johnson that the State may not achieve by indirection what it is forbidden to accomplish directly. See Johnson v. Likens, supra, at 29, 32.

However, I believe that the Johnson court read into Section 402(a)(8) more than Congress said or intended. Johnson's reading of the statute as saying that "$30 + 1/3" of earned income "shall be disregarded in determining the amount of the assistance payment,"

id. at 29 (emphasis added), goes too far. That section instead states only that this portion of the earned income should be disregarded in determining the applicant's need which, as we have seen, may be equal to or greater than the assistance payment.

The Johnson court based its conclusion in part upon its reading of Congressional intent, i.e., that "the income disregard work incentive is absolutely essential to the total A.F.D.C. program * * * ." Id. at 32. It is indeed a familiar rule that,"[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law and to its object and policy." United States v. Heirs of Boisdore, 8 How. 113, 122 (1850). Thus, how far the disregard mandate extends may be accurately gauged only after reference is made to the congressional intent that underlies the less-than-definitive language of Section 402(a)(8).

With reference to the legislative purpose, an earlier Court has observed that the statutory disregard

> "was intended as an incentive to welfare recipients to seek employment. It was part of a congressional effort made to ensure that an applicant not find it more advantageous to remain on welfare than to seek employment. The legislative history reveals a concern among the Congressmen that one of the stated goals of the [AFDC] program --

'to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care' -- was not being achieved.

The Senate Finance Committee stated that disregarding some portion of earned income was essential to implement this objective. The Committee in its report explained: 'A key element in any program for work and training for assistance recipients is an incentive for people to take employment. If all the earnings of a needy person are deducted from his assistance payment, he has no gain for his effort.'

* * * *

The report continued to state that, 'the committee believes that this provision will furnish incentives for members of public assistance families to take employment and, in many cases, increase their earnings to the point where they become self-supporting'." X v. McCorkle, supra, at 1116 (footnotes omitted).

It seems clear that Congress intended that, in the ordinary course of AFDC administration, the earned income disregard should be preserved to the wage earner, intact and undiminished, as a measured impetus to gainful employment. However, the legislative history retraced and recited above nowhere bespeaks a congressional purpose to shield "$30 + 1/3" of earned income under all circumstances and against every State exigency. In that silence, this Court is left to the guidance of the statutory language as it is informed by "those commonsense assumptions that must be made in determining direction without a compass," Rosado v. Wyman, supra, at 412.

If, in the process of recoupment, the State's resort to the disregard as an asset "in excess of need" were, as plaintiff urges, a per se "determination of need" and hence invalid under Section 402(a)(8), the State would be reduced to the status of a creditor peculiarly disabled from recovering against a debtor who by definition is able to repay. Common sense inexorably directs this Court to assume that Congress would not have settled on such result without having engaged in at least some evidenced debate or without projecting that intent via clear statutory directive. In the absence of such markings of an extra-ordinary legislative will, common sense further compels this Court's conclusion that Congress did not intend Section 402(a)(8) to disallow the limited sacrifice of "$30 + 1/3" of earned income for the compelling sake of overpayment recoveries[4/] and a consequently fair apportionment of the limited AFDC funds.

Certainly, as it is applied in the present case, in which the recoupment cancels or reduces the effect of the disregard for only a limited period, there is no destruction of the work incentive, but only a temporary diminution or suspension thereof, and thus no thwarting of congressional intent. It would be easy to imagine more voracious recoupment practices which would effectively kill incentive, but we need not borrow trouble by imagining evils[5/]; we need only rule upon the case at hand and upon the particular regulation under challenge.

The Court is impelled to rule that the New York regulation does not offend the Social Security Act. Whether the regulation can survive plaintiff's remaining constitutional challenges must be left to the determination of a three-judge court, whose convention must await the appeal of this ruling. 6/

SO ORDERED.

WILLIAM C. CONNER

United States District Judge

Dated: New York, New York

February 25, 1976

FOOTNOTES

1. The New York regulation reads as follows:

> "Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available."

2. At that conference, the Court ordered defendants temporarily restrained from recouping overpayments to the McGraw family from their earned income disregard.

3. Although the parties herein have cited numerous decisions addressed to the Social Security Act and involving actually available versus presumed income, recoupments from sources other than disregards in the case of fraud, and alternative methods of calculating budget deficits without strict application of the "$30 + 1/3"-of-earned-income formula, none of those decisions is particularly instructive on the issue presently before this Court. Nor does Bradford v. Juras, 331 F.Supp. 167 (D.Ore 1971), in which Section 602(a)(8) was read in a light favorable to the position of defendants herein, provide a firm platform from which to launch analysis in this case: that reading was based upon the Bradford court's assumption -- by now discredited -- that State application of the disregard formula was not mandatory.

   Plaintiff suggests that the decision in Williams v. Lavine, 353 N.Y.S.2d 340 (Sup.Ct. Nassau 1974), in which it was ruled that the disregard "is not to be applied towards needs that would otherwise be met by a public assistance grant, including a discretionary allowance for rent," id. at 345, serves to fix the analytic course in the present case. However, that ruling does no more than to reaffirm the principle that the disregard must be honored in the determination of an AFDC recipient's need.

It is something of a puzzlement that plaintiff has chosen to emphasize the Williams court's observation that "[t]he work incentive program and its "$30 + 1/3" exclusion in turn comes [sic] from the federal Social Security Act, 42 U.S.C. § 602(a)(8)(A)(ii), which mandates the "disregard" of this portion of earned income.* * * . It is a legislated reward for those individuals who alone assume the double burden of caring for children and a home and working to support both." Id. at 344-45. Such observation only marks the point at which this Court's analytic inquiry must begin; it by no means charts the destination of our ruling.

Defendants, in turn, have referred this Court to the Supreme Court of Nassau County decision in In re De Luca v. D'Elia, (October 21, 1975). In that decision, the claim that the New York regulation conflicts with Section 402(a)(8) was peremptorily discounted as "without merit." However, the treatment of the recoupment/disregard issue in De Luca is so conclusory that this Court hesitates to invoke its support beyond citation.

4. Whether such recapture of amounts owed to the State conforms with due process, i.e., whether due process demands that the State be limited to the ordinary creditor recourse to civil action or garnishment, is beside the present point and beyond this single-judge court's cognizance.

5. The Johnson court's reluctance to sanction recoupment from disregards was in no small measure derived from the assumption that

> "if Minnesota [which provides grants in full satisfaction of recipients' needs] is free to recoup from disregard income in these circumstances, so is a State paying less than need. In such a State, disregard income may be the only resource which allows an A.F.D.C. family to rise to the level of minimum subsistence and recoupment from 'excess' income might be recoupment from the mouths of hungry children." Johnson v. Likens, supra, at 36.

Neither that reluctance nor that assumption, however, was warranted, in the light of the ruling in National Welfare Rights Organization v. Weinberger, supra, and HEW regulations' subsequent conformity therewith. See pp. 10-11 supra.

Moreover, there is something to be said for the no-less-humanitarian concern that, bowed by and bowing to fiscal realities, a State foreclosed from such recoupments might well be obliged to depart from a policy of granting AFDC payments in full satisfaction of need, in which case "hungry mouths" would constitute the rule, rather than the exception.

6. In Taylor v. Lavine, 497 F.2d 1208, 1214 (2d Cir. 1974), reversed on other grounds sub nom. Van Lare v. Hurley, 95 S.Ct. 1741 (1975), the Second Circuit observed that "[w]here the constitutional claim is sufficient to vest the district court with jurisdiction, it is proper for a single judge to decide the statutory question under pendent jurisdiction * * * and, if he sustains it, to defer requesting a three-judge court under 28 U.S.C. § 2281, pending review." (citation omitted).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiffs,

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND CLASS CERTIFICATION

No: 75 Civ. 4692

CONNER, J.

UPON the affidavits of Lloyd Constantine, sworn to September 18, 1975 and Josephine McGraw sworn to on September 23, 1975 and upon the filing of the complaint ORDERED that Let the Defendants show cause in the United States Courthouse, Foley Square, New York, New York, ~~Courtroom~~ No. 3006 on the 30 day of September at 11 A.M. or as soon thereafter as counsel may be heard, why an order should not issue granting the following relief:

Pursuant to Rule 65 FRCP.

(1) A preliminary injunction restraining Defendants, their agents and employees, and all other persons in active concert and participation with them from applying Title 18 New York Code of Rules and Regulations Section 352.31 (d) (1) (ii) to Plaintiff or any other recipient of AFDC, insofar as such regulation authorizes recoupment of AFDC overpayments by withholding earned income disregards authorized by Section 402 (a) (8) of the Social Security Act, through AFDC grant reduction or suspension;

(2) An order pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action as prayed for in paragraphs 8-12 of the complaint.

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It appearing from the complaint, the annexed affidavits of JOSEPHINE McGRAW and LLOYD CONSTANTINE, and the memorandum in support of this order to show cause and request for temporary restraining order, that Plaintiff has raised substantial questions about the legality of 18 NYCRR §352.31 (d) (1) (ii) and its application to Plaintiff, her family, and class members has demonstrated a likelihood of prevailing on the merits, and has shown that she and her family have suffered serious and irreparable injury as a result of the reduction of their AFDC grant authorized by the regulation challenged in this suit, and will suffer additional irreparable injury pending hearing on this matter for a preliminary injunction, and that Defendant's will suffer no irreparable harm should temporary relief be granted in that they may resume recoupment if the preliminary injunction is denied,

IT IS FURTHER ORDERED that pending hearing and determination of Plaintiff's motion for a preliminary injunction, or further order of this Court, Defendants, their successors in office, and agents and employees, are enjoined from applying 18 NYCRR §352.31 (d) (1) (ii) to the plaintiff, her family, or any other person similarly situated, insofar as that regulation authorizes the recoupment of AFDC overpayments by withholding earned income disregards authorized by Section 402 (a) (8) of the Social Security Act, 42 USC §602 (a) (8), through AFDC grant reduction or suspension;

It appearing from the complaint the annexed affidavit of LLOYD CONSTANTINE, and the memorandum of law in support of the Class certification motion, that a prompt answer to Plaintiff's annexed interrogatories is essential for a prompt determination of Plaintiff's motion for class certification and for preliminary injunction on behalf of the class Plaintiff seeks to represent,

IT IS FURTHER ORDERED that the attached set of "Plaintiff's First Interrogatories." to Defendants BERGER and The New York State Department of Social Services be answered within ten (10) days from the date of this order and served on Plaintiff's counsel by 5 P. M. on that date;

IT IS FURTHER ORDERED that personal service of this order, along with the papers on which it is granted, on the Attorney General of the State of New York, attorney for Defendants BERGER and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES and the Corporation Counsel of the City of New York, attorney for Defendant DUMPSON, on or before the day of September 1975, at 5 o'clock P. M. shall be deemed sufficient.

IT is further ordered that any papers opposing said application should be served on counsel for Plaintiff and the Court no later than 12. P.M. monday Sept 29th 2975.

/s/ William C. Conner
U. S. DISTRICT JUDGE

Dated: New York, New York
September 25, 1975

Issued 12.40 P.M.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiffs,

-against-

AFFIDAVIT

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

STATE OF NEW YORK :
: ss.,
KINGS COUNTY :

LLOYD CONSTANTINE, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of counsel to JOHN C. GRAY, JR., attorney for the Plaintiff herein. I submit this affidavit in support of the Order to Show Cause submitted herewith.

2. This case involves the legality of a New York State Welfare regulation, 18 New York Code of Rules and Regulations §352.31 (d) (1) (ii), of statewide applicability. The regulation provides for the recoupment of AFDC overpayments caused by administrative error, and not occassioned by the willful act of the recipient. Earned income, disregarded as a work

incentive pursuant to 42 USC §602 (a) (8), is defined in the challenged regulation as income "exclusive of" the AFDC payment and the regulation authorizes the local social services agency to reduce the AFDC grant up to the amount of money statutorily disregarded until recoupment is effected. The regulation thus results in the diminution or suspension of AFDC grants on the basis of a regulatory fiction that what is being withheld is the previously

disregarded income, rather than part of the AFDC grant itself. Plaintiff's factual allegations and legal claims are more fully set forth in Plaintiff's complaint and affidavit annexed to the Order to Show Cause and the memorandum of Law in support thereof.

3. It is necessary to proceed by order to show cause for two reasons. First, the Plaintiff has requested a temporary restraining order to restore her family's AFDC grant to the level which obtained prior to application of the challenged regulation to her case, pending the hearing and determination of a motion for preliminary injunction. The requested temporary relief is needed immediately. Plaintiff has requested similar relief for the class she wishes to represent. Second, a speedy hearing on Plaintiff's motions for a preliminary injunction and class certification are necessary. Plaintiff believes that the purported class encompasses thousands of AFDC grantees in the families of working recipients. The Supreme Court's decision in Edelman v. Jordan, 94 S. Ct. 1347 (1974) would bar this Court from ordering the Defendant's to restore illegally reduced or suspended AFDC grants retroactively i.e. only prospective restoration may be ordered. Thus, the class must be certified and the injunction or temporary restraining order issued for effective relief to commence. Assuming, arguendo, that Plaintiff's claims are meritorious, a class of people are being illegally denied vital welfare benefits, which no Federal Court may restore, as each day passes. In this situation the need for a speedy hearing of these motions is obvious, unless a class temporary restraining order is issued. Such an order would obviate the need for immediate hearing on the preliminary injunction motion but not for the order to show cause to secure a temporary restraining order.

4. Plaintiff has requested answers to her first interrogatories within ten days. Your Deponent believes that the information requested is readily available to the staff of the New York State Department of Social Services and that the information is essential to an effective presentation of Plaintiff's requests for class certification and a preliminary injunction.

5. Plaintiff has made no other request for this relief to any Court.

6. I have notified the Attorney General and the Regional Counsel, attorneys for all defendants, of my intention to move for temporary restraining order in this action, by telephone

Y. C

Lloyd Constantine

LLOYD CONSTANTINE

Sworn to before me this

18th day of September, 1975.

Stephen Dobkin

NOTARY PUBLIC

STEPHEN DOBKIN
Notary Public, State of New York
No. 24-6050725
Qualified in Kings County
Commission Expires March 30, 1975

27

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiffs,

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

AFFIDAVIT

No:

STATE OF NEW YORK :
: ss.,
COUNTY OF NEW YORK :

JOSEPHINE McGRAW, being duly sworn, deposes and says:

1. I reside at 201 West 93rd Street, New York, New York.

2. I am the mother of nine (9) minor dependent children, MARK age 5, MATTHEW age7, ROBERT age 10, STEPHANIE age 12, GERMAINE age 13, TERESA age 14, LEWIS age 16, PAMELA age 17, and ARMON age 19, who is a full time student.

3. I work for Saint Matthew - Saint Timothy Day Care Center as a cook's helper. I have had this job for three years.

4. My children and I receive Aid To Families with Dependent Children (AFDC) to supplement my salary. My family received AFDC before I began my present job and have received assistance throughout the time I've worked.

5. My take home pay, at present, is approximately $117. per week.

6. My salary and AFDC grant are my family's only source of income.

7. I reported my job to Welfare when I first began to work and have

reported to them each time my salary was increased.

8. In figuring out our welfare check, the Department of Social Services deducts the first $30.00 and 1/3 of the remainder from my monthly earnings and also deducts my work expenses.

9. Although I have always reported my salary changes, Welfare has made many mistakes in my grant and I never understand how they figure out my budget. My lawyer has requested a fair hearing for me so that Welfare will straighten out my budget. I believe I am being underpaid.

10. In early May, 1975, I received a notice from the Department of Social Services dated April 29, 1975. The notice said that they had overpaid us since July 1974 by more than $990.00 and that they were going to suspend our welfare check for 13 issues, which is 6 1/2 months. I really didn't understand how we had been overpaid. I didn't have any of this $990.00 to pay welfare back and I didn't see how my family of 10 people could survive on my salary of $117.00 a week. (A copy of the notice is annexed hereto as Exhibit "A").

11. When I could get off work I went to a Legal Services office and showed them the letter from Welfare. The requested a fair hearing for me.

12. While I was waiting for the fair hearing my Welfare check was reduced from $132.00 twice a month to $108.00 twice a month, but at least they didn't cut us off altogether as the notice (Exhibit "A") said they would.

13. On June 3, 1975 I had a fair hearing at 80 Centre Street in Manhattan. I explained that I didn't understand how we had been overpaid, that I reported my salary, and that if we had been overpaid I didn't have the money anymore. The little money we have goes quickly with nine children. The man from the Department of Social Services said that I had some of my salary disregarded because of the law, and that this disregarded money was extra, and that Welfare could recover the overpayment from this money by reducing our Welfare checks.

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14. In August I received the fair hearing decision in the mail. It said that it was the Department's error that was the reason for the overpayment, but that because of the disregarded part of my salary I had extra money which Welfare could withhold to recover the overpayment. (A copy of the decision is annexed hereto as Exhibit "B").

15. My welfare check has been reduced as I said before. This makes it much harder for us to get along. With nine children a $48 per month reduction means that we all must go without a little food and without replacing worn-out clothing, because there is no extra money for anything else normally. We are finding it very hard to get along. My lawyer has explained that my check will be reduced for 21 months at this rate. I can't understand why they are punishing us because they made an error in budgeting my salary. Now they are taking away the money we are supposed to get as a reward for me going to work. It seems like my family is being punished twice because I work. Other welfare recipients who don't work don't have these problems and I think this is all very unfair. I hope that my lawyer can straighten out my budget and that the court will tell Welfare to restore my welfare check. We cannot manage on the money we have now and the situation gets worse each week. I understand that there are other people in my situation, and I hope the Court will help them also.

Josephine McGraw

JOSEPHINE McGRAW

Sworn to before me this

23rd day of September, 1975.

Lloyd Cartier

NOTARY PUBLIC

LLOYD CARTIER
Notary Public, State of New York
No. 30-4530482
Qualified in Nassau County
Commission Expires March 30, 1977

K-30

EXHIBIT A R-31

The City of New York

DEPARTMENT OF SOCIAL SERVICES

Center: Interboro 3 24
Address: 260 W. 39th

NOTICE OF INTENT TO DISCONTINUE OR SUSPEND PUBLIC ASSISTANCE
(Prepare original and 4 copies)

Case Name: Medrow, Josephine
Case No.: 421-2065917-1
Group: 02A
Case Composition:

Name	Relationship	Age
Medrow, Josephine	Self	36
9 DCH		

Josephine Medrow
201 W. 93 St.
New York, N.Y. 10025

This is to advise you that this Department intends to ☐ Discontinue or ☒ Suspend your public assistance grant on 5/6/75 (date) for the following reason(s):

Your S/M income from the period July, 1974 to present should have been $127.59, not $30.13 as previously budgeted. This resulted in $990.36 in overpayment for this period. Regulations permit recoupment on amounts up to the total exempted income. Since your budget deficit is less than your exempted income your case will be suspended for 13 issue until this amount is recouped.

You may have a conference at this center to review this decision at any time before the proposed date of discontinuance or suspension of your grant. If you wish a conference please call us at 534-1[illegible] (telephone no.).

Eric Sch[illegible] — 4/25/75 — [illegible]
Worker/Income Maintenance Specialist — Date — Section or Group

K. Heard — 4/29/75 — 02A
Supervisor — Date — Section or Group

RIGHT TO FAIR HEARING

If you believe that your assistance should not be discontinued or suspended, you may request a state fair hearing by telephoning 488-6550 or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence as to why this action should not be taken. You will also have an opportunity to question any persons who appear at the hearing to present evidence against you. If you request a fair hearing before the date your assistance is proposed to be discontinued or suspended you will continue to receive your assistance unchanged until the fair hearing decision is issued.

BEST COPY AVAILABLE

(Please turn)

§602(a) A state plan for aid to needy families with children must

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

31a

In the Matter of the Appeal of : DECISION AFTER FAIR HEARING

JOSEPHINE MC GRAW :

from a determination by the New York City Department of Social Services (hereinafter called the agency) :

A fair hearing was held at 80 Centre Street, New York, New York on June 3, 1975, before Harry Z. Berger, Hearing Officer, at which the appellant and a representative of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of a grant of aid to dependent children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

1. The appellant is currently in receipt of a grant of aid to dependent children for herself and nine children.

2. As a result of an administrative error the agency has been underbudgeting employment income of appellant. On April 29, 1975, the agency determined to reduce the appellant's budget to recover the overpayment resulting from incorrect budgeting.

BEST COPY AVAILABLE

3. The appellant does have available to her income or resources in excess of her public assistance grant from which recovery may be made.

Section 352.31(d) of the Regulations of the State Department of Social Services provides that overpayments of assistance made within twelve months prior to the discovery of such overpayments may be recovered from a recipient future grants in an amount not to excees ten percent of the family needs, or fifteen percent of the family needs where two or more recoupments are undertaken simultaneously, but only where the recipient has available income or resources in excess of the public assistance grant, including exempted income and disregards, from which recovery can be made. The credible evidence in the record established that the appellant's grant was overpaid as a result of employment income being underbudgeted as a result of an Administrative error of the agency. It further establishes that the appellant has income or resources in excess of the public assistance grant from which recovery can be made. Accordingly, the determinations of the agency to correct appellant's budget so as to properly reflect her employment

EXHIBIT "B"
R-32

income and to recover the overpayments of assistance was correct.

DECISION: The determination of the agency is affirmed.

DATED: Albany, New York

AUG 06 1975

Stephen Berger
COMMISSIONER

BY Peter Mullany
Peter Mullany
ASSISTANT COUNSEL

Ex "B" P. 2 R 33

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiffs,

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Civil Action No. 75 Civ. 4524

PLAINTIFF'S FIRST INTERROGATORIES TO DEFENDANTS BERGER AND THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

With respect to all of the following, cite the source using your most recent statistics. All questions refer to New York State in its entirety. All questions refer to the AFDC program only.

1. State the number of working recipients of AFDC in New York State whose "available income" is computed in accordance with the disregard procedures of 42 USC §602 (a) (8). Classify these as to numbers of working mothers, fathers, dependent children, etc.

2. State the percentage of cases in a given year (or other specified period) in which there is known to be or estimated to be (specify) an overpayment error. State the number of such cases and total number of recipients in these cases (households).

3. State the percentage of overpayment errors known to be or estimated to be (specify) caused by agency error in the most recent period (specify).

4. State the percentage of overpayments known to be or estimated to be (specify) caused by recipient error, for the most recent period (specify). What percentage of these, recipient caused overpayments are deemed to be due to willful misrepresentation or withholding of information (fraud). What standard is applied in distinguishing recipient caused errors which are willful from those which are deemed not to be willful. Cite the authority.

5. When an overpayment error is discovered which was caused by underbudgeting of earned income (the recipient has more earnings than were budgeted) do the local agencies apply the disregard procedure to the extra income in determining the amount of overpayment to be recouped. Cite the authority and annex any administrative directive on this issue.

6. State the total number of overpayment recoupments by grant reduction effected in the most recent interval (specify).

7. State the number of people and the percentage of cases (households) in which there is some earned income budgeted (not simply the number and percentage of working persons).

8. State or estimate (specify) the total number of recoupments from earnings disregards in effect at present.

Dated: Brooklyn, New York
September 23, 1975

Respectfully submitted,

JOHN C. GRAY, JR.
Lloyd Constantine, Of Counsel
Attorney for Plaintiff
Brooklyn Legal Services Corp. B
152 Court Street
Brooklyn, New York 11201
Tel. (212) 855-2003

R-35

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiffs, : CLASS ACTION

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services, : No.

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1) The named Plaintiff, in this suit, is a working recipient of Aid to Families with Dependent Children (hereinafter referred to as "AFDC"), for herself and her nine (9) minor dependent children. As a working AFDC recipient, Plaintiff receives the benefits of work, incentive, earned income disregards, enacted by Congress in the Social Security Act. Social Security Act §402(a)(8); 42 U.S.C. §602(a)(8). A specified portion of her income is disregarded in determining her family's need for AFDC.

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25 supra). This unexplained departure from Defendant Dumpson's previously

2) Plaintiff received overpayments of AFDC due to the error of the New York City Department of Social Services. This agency is currently overpayment from the
re ouping the amount of the/family's AFDC grant, by treating the earned income disregard as income which is available for this purpose, i.e. the agency is withholding the earned income disregard from Plaintiff's family to recoup the overpayment made through the agency's own administrative error.

3) Plaintiff individually, and on behalf of her minor children, and all persons similarly situated seeks to have this Court declare invalid and preliminarily and permanently enjoin enforcement of Title 18 New York Code of Rules and Regulations §352.31 (d) (1) (ii) which authorizes the Defendant to withhold the income disregard to recoup the overpayment made through administrative error.

II. JURISDICTION

4) Jurisdiction is conferred on this Court by 28 U.S.C. §1343 (3) (4) and 1331. The matter in controversy exceeds in value, exclusive of interest and costs $10,000.00.

5) Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments and by 42 U.S.C. §1983 which provides redress for the deprivation, under color of state law, of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Laws and Constitution of the United States.

III. PLAINTIFF

6) JOSEPHINE McGRAW, and her nine minor dependent children, MARK age 5, MATTHEW age 7, ROBERT age 10, STEPHANIE age 12, GERMAINE age 13, TERESA age 14, LEWIS age 16, PAMELA age 17, and ARMON age 19, who is a full-time student, are citizens of the United States and the State of New York, residing at 201 West 93rd Street in New York County.

7) Ms. McGRAW is employed as a "cook's helper" at Saint Matthews-Saint Timothy Day Care Center in Manhattan. She has held this position for the last three years. Ms. McGRAW's wages and a supplementary grant of AFDC are the sole source of income for herself and her nine children.

IV. CLASS ACTION ALLEGATIONS

8) The named Plaintiff brings this action on her own behalf, for her nine minor dependent children, and pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated.

9) The persons similarly situated are all employed recipients of AFDC in New York State and their families, who receive the benefit of earned income disregards pursuant to 42 U.S.C. §602(a)(8), who have received AFDC overpayments not occassioned by their willful misrepresentation or withholdin of information, and who are having all or part of their earned income disregards withheld by a local agency of the New York State Department of Social Services, to recoup the AFDC overpayment, under authority of 18 New York Code of Rules and Regulations §352.31 (d) (1) (ii).

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10) The class is so numerous that joinder of all members is impracticable. There are approximately 36,137 working mothers in AFDC families encompassing approximately 131,720 AFDC recipients in the State of New York. Aside from working mothers there are other working AFDC recipients who must receive the benefit of earned income disregards pursuant to 42 U.S.C. §602 (a) (8). (Characteristics of AFDC families in New York State, January 1973, N.Y.S.D.S.S. Pub. No. 1188, 8/74). Recent H.E.W. statistics reveal overpayment errors in a significant percentage of New York's AFDC cases and that in 50% of these, administrative error is the cause of the overpayment. All these working recipients and their families are actually or potentially subject to infringement of rights secured them by the Social Security Act, under color of the challenged statewide regulation. It is clear that the class, at present, encompasses thousands of the working poor of New York State.

11) The named Plaintiff can fairly and adequately protect the interests of the class. Because of her indigency, Plaintiff is represented by Brooklyn Legal Services Corporation "B" a neighborhood legal services program funded formerly by the U.S. Office of Economic Opportunity and the Community Services Administration and imminently by the new National Legal Services Corporation. Attorneys from Brooklyn Legal Services have litigated numerous public assistance class actions in this Court and the Eastern District. Plaintiff knows of no conflicts of interest among the members of the class.

12) The questions of law and fact raised by Plaintiff are common to the class. The common legal claims are each of those contained in the claims for relief in this complaint. The common factual issue is the withholding of all or part of a working recipient's earned income disregard to recoup the

amount of an AFDC overpayment caused by agency error. In that the Defendants have acted on grounds generally applicable to the class, that is, the withholding of statutory earned income disregards, to recoup AFDC overpayments caused by administrative error, injunctive and declaratory relief is appropriate with respect to the class as a whole.

V. DEFENDANTS

13) STEPHEN BERGER is the Commissioner of the New York State Department of Social Services. He is charged by Social Services Law §§11, 17, and 34 with administration of the Department and is responsible for its compliance with the law. Defendant BERGER rendered the fair hearing determination referred to in paragraph 28 infra, in which he determined the New York State regulations applicable. Defendant determined that Plaintiff's earned income disregards could be withheld to recoup the AFDC overpayment caused by administrative error, and ordered Defendant DUMPSON to carry out the terms of this decision. Defendant BERGER's decision applied the regulation challenged herein to the facts of Plaintiff's case.

14) Defendant JAMES DUMPSON is the Commissioner of the New York City Department of Social Services and is charged by New York Social Services Law §77 et seq. with administering the statewide public assistance programs, including AFDC, in the City of New York. Defendant DUMPSON is responsible for the Department's compliance with the law. His agency originally determined to recoup the AFDC overpayment, made through the agency's own error, from the Plaintiff's earned income disregards, under the authority of the regulation challenged herein.

15) The Defendant NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES is the State agency authorized by NEW YORK SOCIAL SERVICES LAW §20 with supervision of the State's public assistance programs and its local Social Services districts, the New York City district among them.

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VI. FACTUAL ALLEGATIONS

16) New York's participation in the Federal grant-in-aid program of AFDC is authorized by the Social Security Act ("The Act") §401 et. seq.; 42 U.S.C. §601 et. seq., which mandates state compliance with specified standards as a condition for receipt of Federal matching funds.

17) The Act defines the sole eligibility requirements which states must impose on recipients of AFDC and prohibits the states from imposition of any additional eligibility requirements. While the States define the income levels below which people will be considered "needy" i.e. financially eligible for AFDC, the Social Security Act mandates the standards and procedures for computing the "income" and "resources" of applicants and recipients. The "income" of a given applicant or recipient computed under these requirements of the Social Security Act is measured against the State definition of "needy" to determine initial and continuing eligibility for AFDC.

18) The standards for computing "available income" are set forth in Section 402 (a) (7) of the Act; 42 U.S.C. §602 (a) (7); the so-called "income and resources clause," which states in relevant part:

> 42 U.S.C. §602
>
> (a) a state plan for aid and services to needy families with children must
>
> (7) except as may be otherwise provided in clause (8), agency shall in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . .
>
> . . . . . .
>
> (Emphasis added).

19) Section 402 (a) (8) of the Act; 42 U.S.C. §602 (a) (8) (referred to as "clause (8)" in §602 (a) (7) supra, provides in relevant part:

§602(a) A state plan for aid to needy families with children must

(8) provide that, in making the determination under clause (7), the State agency –

(A) shall with respect to any month disregard –

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i) a relative receiving such aid and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b)(2) and (3) of this title);

(Emphasis added)

These provisions of §602(a)(8) are the so-called "earned income disregards" enacted by Congress in 1967 to provide an incentive for AFDC recipients to find and retain gainful employment. The earnings disregard provided for in §602(a)(8)(A)(ii) is the so-called "30 and 1/3" earned income disregard, and is hereinafter referred to as such.

20) In §§602(a)(7) & (8) Congress has provided a statutory requirement that an applicant for AFDC exhaust all available income before resorting to public assistance, with the explicit exception of the statutorily exempt income. This disregarded income need not be exhausted, and cannot be considered as "available income" by the State for AFDC purposes

i.e. this income does not reduce the "need" for AFDC.

21) Title 18 New York Code of Rules and Regulations, (hereinafter referred to as "18 NYCRR") §352.31(d)(1)(ii) which deals with recoupment of AFDC overpayments made to recipients and not occassioned by any willful act on their part, states in relevant part:

> (d) Recoupment of overpayments. (1) Except as provided in paragraph (2) of this subdivision, recoupment of overpayments of assistance including overpayments resulting from assistance paid pending a hearing decision shall be treated as follows:
>
> (ii) Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available.

In effect, this regulation authorizes the withholding of the work incentive, earned income disregards to recoup overpayments made through the agency's administrative error.

22) JOSEPHINE McGRAW has been employed by the Saint Matthew-Timothy Day Care Center as a "cook's helper" for the past three years. During this period and prior to the time she began this work, Plaintiff and her nine minor dependent children received AFDC in a grant administered by the New York City Department of Social Services, (hereinafter referred to as the "City Agency").

23) When Plaintiff began to work, the City Agency deducted the first $30 and one-third of the remainder from her gross monthly earnings, in determining the amount of her salary to apply against the family's "need" for continued AFDC payments. This "30 and 1/3" disregard was mandated by 42 U.S.C. 602 (a)(8).

24) The City Agency informed the Plaintiff on a form M3C – Notice of Intent to suspend Public Assistance dated April 29, 1975, that it was the "City Agency's" intention to suspe Plaintiff's family's entire grant of public assistance for 6 1/2 months (13 semi-monthly issues)

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to commence on May 9, 1975. The reasons for the proposed suspension of the family's AFDC grant were stated thereon:

> Your S/M [semi-monthly] income from the period July, 1974 to present should have been $127.59, not $80.43 as previously budgeted. This resulted in $990.36 in overpayment for this period.
>
> Regulations permit recoupment on amounts up to the total exempted income. Since your budget deficit is less than your exempted income your case will be suspended for 13 issue(s) until this amount is recouped.
>
> (Emphasis added)

Thus, the "City Agency" having ascertained that it had understated the amount of plaintiff's income for 10 months, and in consequence overpayed the plaintiff's family, intended to recoup the overpayment. Referring to 18 NYCRR §352.31 (d) (1) (ii), the agency informed plaintiff that State regulations treated her earned income disregard (referred to therein as "exempted income") as available for recoupment. It was further alleged that the amount of plaintiff's salary, disregarded pursuant to the "30 and 1/3" formula was greater than the current AFDC grant, i.e. if the family's income were computed without application of the disregard, the family would not be deemed "needy" and would not receive any AFDC grant. Therefore, the agency would suspend the AFDC grant for 6 1/2 months, in effect, withholding the income disregard until the amount of the overpayment was recouped.

25) The City Agency has incorrectly computed the amount of overpayment, the proper amount of the family's AFDC grant and the rate of recoupment. These issues are not raised in this suit: correction of the agency's errors, in this regard, will be pursued through administrative channels. The sole issue in this litigation is the legality of the defendant's action in recouping the overpayment made through administrative error, by withholding the statutory earned income disregards.

26) On May 14, 1975 the Plaintiff requested a fair hearing from the Defendant New York State Department of Social Services (hereinafter referred to as the "State Agency") to review the decision of the City Agency to recoup the alleged overpayment.

27) On June 3, 1975 Defendant BERGER, through his designated hearing officer, held a hearing pursuant to Plaintiff's request.

28) In a decision after hearing dated August 6, 1975, Defendant BERGER determined the following:

A) The AFDC overpayment had been made due to the "administrative error" of the City Agency.

B) Recoupment of an overpayment made through agency error could not be effected unless the recipient had income or resources in excess of the public assistance grant.

C) The Plaintiff's "30 and 1/3" earned income disregard represented income in excess of the public assistance grant, which could be recouped. Defendant BERGER cited 18 NYCRR §352.31(d), the regulation challenged herein, as authority for this ruling.

D) The City Agency's decision to recoup the overpayment was affirmed.

29) Pursuant to the City Agency's decision applying 18 NYCRR §352.31 (d)(1)(ii) and the affirmance by Defendant Berger referred to in paragraph 28 supra, Defendant Dumpson has reduced Plaintiff's family's public assistance grant from $132.00 semi-monthly to $108.00 semi-monthly. This action began in May 1975 and continues to date. At the current rate, recoupment will continue for approximately 21 months i.e. until February 1977. Plaintiff has not been provided with any explanation as to why her grant is being reduced for 21 months, rather than suspended completely for 6 1/2 months as the City Agency originally intended (See paragraphs 24 and

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25 supra). This unexplained departure from Defendant Dumpson's previously stated intention does not affect the essential fact that Defendant Dumpson is proceeding with recoupment under authority of 18 NYCRR §352.31(d)(1)(ii).

30) Plaintiff, neither at the time of the City Agency's original decision to recoup, nor at the time of the fair hearing, had any income other than her earnings and her family's supplementary AFDC grant. Therefore, recoupment is being effected solely by reduction of the grant. See paragraph 29 supra. The portion of the grant being withheld, in turn, represents a portion of the earned income disregard which the challenged regulation treats as income "in excess of" the AFDC grant. Thus, the AFDC grant computed in accordance with the requirements of the Social Security Act is reduced by employing the regulatory fiction that in reducing the AFDC grant the Agency is thereby withholding money which is "exclusive of" and "in excess of" that grant. The transparency of this deception is apparent.

31) The AFDC grant is the difference between an objective standard of need (an amount the State legislature determines the family needs to subsist) and "income". "Income" is computed after the disregard of a statutorily specified proportion of earnings. Treating the disregarded income as something "in excess of" the grant, when that grant "must" be computed utilizing the disregard, is not only illegal but an act of blatant regulatory dishonesty.

32) The Defendant's upon discovering that they had overpayed Plaintiff through their own error could not legally refuse to compute her grant in accordance with the Social Security Act, including the provision requiring disregard of specified proportions of earned income, neither can Defendants withdraw the disregards once the grant is computed utilizing them, for the effect is not different nor the result less legally infirm than in the first instance.

33) Recoupment of the overpayment, made through administrative error, has reduced Plaintiff's family's AFDC grant below the level of assistance received when their grant was computed in accordance with the requirements of the Social Security Act. This reduction in income has caused Plaintiff's family hardship and has required the family to survive without necessary food clothing and other essential items.

34) Plaintiff was faultless in the overpayment, as Defendant BERGER has determined. Despite this, her family's grant is reduced solely because she works in an effort to elevate herself and improve her family's position in society. Because the challenged regulation authorizes recoupment of earned income disregards, by definition, only the working AFDC recipient may be victimized under its provisons. Furthermore, the overpayment was caused by the agency's failure to properly assess and budget earnings duly reported by the Plaintiff. Plaintiff's plight is a product of Agency error and her desire to work. The challenged regulation makes the State whole for its errors by singling out working persons and withdrawing statutory work incentives enacted for their benefit by Congress.

35) Deprivations similar to those visited upon Plaintiff's family are experienced by all members of the class and their families. They are all working people and working poor by definition. They have all faultlessly received overpayments, which have already been expended. They are all having their income disregards withheld by reduction or suspension of their AFDC grant in violation of the Social Security Act, and in consequence their incentive to work has been seriously diminished, and their family's income substantially reduced.

VII. FIRST CLAIM FOR RELIEF

36) Plaintiff and her family are recipients of an AFDC grant in supplementation of Plaintiff's earnings. Her "income" as used to determine "need" for and the amount of the AFDC grant was computed in accordance with 42 U.S.C. §602(a)(8), in that the first $30.00 and 1/3 of the remainder of Plaintiff's monthly earnings were disregarded.

37) The City Agency made AFDC overpayments to Plaintiff's family through administrative error, and upon discovering the error determined to recoup the overpayments by suspending Plaintiff's family's AFDC grant, as is more fully set forth in paragraph 24 supra.

38) Defendant BERGER determined that Defendant DUMPSON could recoup the overpayment by reduction of Plaintiff's families AFDC grant, although Plaintiff did not have the overpayment at the time of the hearing nor at the time of Defendant Dumpson's original decision to recoup. The application of 18NYCRR §352.31(d)(1)(ii), as more fully described in paragraph 29-34 supra, required that earned income disregards, that Plaintiff's family received the benefit of, in accordance with 42 U.S.C. §602(c)(8), be treated as currently available income "exclusive of" and "in excess of" the AFDC grant, to be withheld by a grant reduction equalling the overpayment

39) Defendant DUMPSON reduced Plaintiff's family's AFDC grant and continues to reduce the grant as more fully detailed in paragraph 29 supra.

40) Plaintiff's family has suffered a severe reduction in income and Plaintiff's incentive to remain gainfully employed has been seriously diminished.

41) In denying Plaintiff's family and all members of the class the earned income disregards granted them by Congress in 42 USC §602(a)(8), the challanged regulation on its face and as applied by Defendants' conflicts with the Social Security Act, and as such is unconstitutional as it violates

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the Supremary Clause of the United States Constitution.

VIII. SECOND CLAIM FOR RELIEF

42) Plaintiff realleges paragraphs 36-41 supra.

43) Plaintiff received the AFDC overpayment through no fault of her own and due to the error of Defendant DUMPSON's Agency. Similarly all members of the class received AFDC overpayments through no fault of their own. Defendants as authorized by 18 NYCRR §352.[illegible](d)(1)(ii) have reduced or suspended the AFDC grants of Plaintiff's family and of the families of all members of the class, despite the fact that Plaintiff and all class members were without fault in receiving the overpayments. The challenged regulation specifically authorizes recoupment of overpayments made without fault on the part of the recipient. Punishment by reduction of Plaintiff's AFDC grant and the grants of all class members, who are all without fault, denies them the due process of law guaranteed in the 14th Amendment to the United States Constitution. The regulation is invalid on its face and as applied by Defendants.

IX. THIRD CLAIM FOR RELIEF

44) Plaintiff realleges paragraphs 36-41 supra.

45) Plaintiff and all class members are subjected to AFDC grant suspension or reduction solely because they receive statutory earned income disregards. AFDC recipients who, without fault, receive overpayments but who do not work and consequently do not receive the benefit of income disregards would not suffer the reduction of their AFDC grant.

46) The challenged regulation creates classes of AFDC recipients: those who without fault received overpayments and do not work, and those who are in all respects identically situated but do work and receive earned income disregards, and without any rational or permissible justification subjects the latter class to grant reduction to recoup overpayments, while the former class is not subject to grant reduction. The challenged regulation thus deprives the latter class, Plaintiff and her class, of the equal protection of the law in violation of the 14th Amendment to the United States Constitution. The regulation is invalid on its face and as applied by the Defendants.

X.

47) Plaintiff and members of the class have no adequate remedy at law.

48) Plaintiff has exhausted her administrative remedies. Administrative remedies would be futile for members of the class who have not already exhausted them. Defendant BERGER is the Commissioner of the New York State Department of Social Services and in this capacity promulgates and administers the State welfare regulations, 18 NYCRR §352.31(d)(2)(ii) among them. In decisions after administrative fair hearings he is bound to apply these regulations as he did in the fair hearing decision of the named Plaintiff, more fully detailed in paragraph 28 supra.

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XI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays on her own behalf, for her minor dependent children, and on behalf of all other similarly situated persons, that this Court:

49) Assume jurisdiction of this cause, and set this case down promptly for a hearing;

50) Determine by order pursuant to Rule 23 (c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action in accordance with the allegations of paragraphs 8-12 of this Complaint;

51) Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57, and 58 of the Federal Rules of Civil Procedure, declaring that Title 18 New York Code of Rules and Regulations Section 352.31(d)(1)(ii), is invalid on the grounds that it violates the Supremacy Clause and is repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;

52) Grant a temporary restraining order enjoining Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, including all employees of local social service agencies under the jurisdiction of the New York State Department of Social Services, from applying 18 NYCRR §352.31(d)(1)(ii) to Plaintiff and all members of the class, by recouping AFDC overpayments from income disregards authorized by the Social Security Act, through the mechanisms of AFDC grant reduction and suspension;

53) Grant a preliminary and permanent injunction enjoining the Defendants, their successors in offices, agents and employees, and all others in active concert and participation with them, including all employees of local Social Service agencies under the jurisdiction of the New York State Department of Social Services from applying 18 N.Y.C.R.R. §352.31(d)(1)(ii) to Plaintiff and all members of the class by recouping AFDC

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overpayments from income disregards granted by the Social Security Act, through the mechanisms of AFDC grant reduction and suspension;

54) Allow Plaintiff her costs herein and grant her and all persons similarly situated such additional or alternative relief, as may seem to this Court to be just, proper and equitable.

Dated: Brooklyn, New York
September 17, 1975

Respectfully submitted,

JOHN C. GRAY, JR.
LLOYD CONSTANTINE, Of Counsel
BROOKLYN LEGAL SERVICES
CORPORATION "B"
152 Court Street
Brooklyn, New York 11201
(212) 855-8003

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

- x

JOSEPHINE McGRAW, et. al.,

Plaintiffs,

-against-

STEPHEN BERGER, et. al.,

Defendants.

- x

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPHINE McGRAW, being duly sworn deposes and says that she resides at 201 West 93rd Street, New York, New York; that she is the plaintiff herein; that she has read the foregoing complaint and knows the contents thereof and that the same are true to her own knowledge, except as to matters therein alleged on information and belief, and as to those matters she believes them to be true.

Josephine McGraw
JOSEPHINE McGRAW

Sworn to before me this
23rd day of September, 1975

NOTARY PUBLIC

Notary Public
No. 30-
Qualified in Nassau County
Commission Expires March 30, 1977

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Linda D. Johnson, individually, and on behalf of her minor child Brandon Johnson, and Jeanne Allan, individually, and on behalf of her minor children Bradley and Kevin Allan, and Patricia Morrison, on behalf of herself and her minor children , Rachel, Roderick, Barbara and Robert Morrison, and on behalf of all others similarly situated,	)	
Plaintiffs,	)	MEMORANDUM AND ORDER
vs.	)	No. 4-75-Civ. 318
Vera Likins, individually, and in her capacity as Commissioner of Public Welfare in the State of Minnesota, and Richard Hanson, John Derus, Thomas Olson, E. R. Robb, Jr., and Thomas Ticen, individually, and in their capacity as members of the Hennepin County Welfare Board,	)	
Defendants.	)	

****

On July 9, 1975, plaintiffs filed a complaint in this court seeking injunctive and declaratory relief against the defendants. Plaintiffs complain of the recoupment of certain monies from their monthly A.F.D.C. payments.[1] In each case the recoupment is of amounts previously overpaid to plaintiffs, which overpayments were the result solely of agency error and not the error of the recipient. Such recoupment or threatened recoupment as to all three plaintiffs is now being accomp-

lished pursuant to Department of Public Welfare (DPW) AFDC Program Manual VI-C-2 dated July 31, 1975.[2] This guideline permits recoupment of prior agency-caused overpayments by means of reduction of current grant payments in the amount of one-half of the recipient's "disregard income."[3] Plaintiffs pray for a declaratory judgment that such recoupment from disregard income is a violation of the Social Security Act, 42 U.S.C. § 602(a)(8) and ask that such recoupment be enjoined.

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Plaintiffs further allege that such recoupment violates the equal protection clause of the 14th Amendment to the United States Constitution and ask, in the alternative, for the convening of a 3-Judge Court to hear the constitutional claim. The Court finds that it has subject matter jurisdiction of this controversy pursuant to 28 U.S.C. § 1343(3). The Court will first consider the pendent statutory issues, resolution of which may avoid the necessity of reaching the constitutional claim or of the convening a 3-Judge Court. See Hagans v. Lavine, _____ U.S. _____, 94 S.Ct. 1372 (1974); Nelson v. Likins, 389 F. Supp. 1234 (D. Minn. 1974), affirmed per curiam, 510 F.2d 414 (8th Cir., 1975).

Plaintiffs have moved the Court for a preliminary injunction as to the statutory claim, and have moved further for an Order certifying the action as a class action composed of those recipients of A.F.D.C. benefits who have received overpayments caused solely by agency error and who are being or may be subjected to recoupment of such overpayments from disregard income. Defendants urge the Court to abstain, pending decision of three recoupment cases presently before the Minnesota Supreme Court, and urge that the complaint be dismissed for failure of plaintiffs to join an indispensable party, the Secretary of the Department of Health, Education and Welfare (HEW). Four questions have thus been posed for the Court: (1) Should a class action be certified, (2) should the Court abstain, (3) should a preliminary injunction issue at this time, and (4) is the Secretary of HEW an indispensable party.

The Court heard oral argument on August 22, 1975. Plaintiffs were represented by Eric Janus of the Minneapolis Legal Aid Society and Defendant Likins was represented by John Daniels, Jr., and Thomas Fabel from the Minnesota Attorney General's office. The county defendants made no appearance. The questions presented and the issues raised have been extensively briefed and cross-briefed by the appearing parties.

I. CLASS CERTIFICATION -

Plaintiffs assert that all the prerequisites of Federal Rules of Civil Procedure Rule 23(a) and 23(b)(2) have been met. Though defendant

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does not seriously contradict these claims, the Court entertains some doubt whether the class is as numerous as plaintiffs suggest. The class size estimate is based on a series of statistical program averages, which may or may not be of continuing validity, and which may or may not be applicable to any particular subgroup of A.F.D.C. recipients.[4] Furthermore, disregard income recoupment is not the only repayment alternative availailable to the State. Such recoupment is unnecessary where the recipient agrees to a voluntary plan of repayment.[5] Persons acquiescing in repayment should not be included in any class involving this lawsuit.[6] The actual number of recipients involved in recoupment under the circumstances of this suit is a rough estimate.[7]

More importantly, defendant's objection to class certification is well grounded, for even were numerosity well established there is little reason for this action to proceed as a class action when the relief plaintiffs seek is equally available in the individual suits. Plaintiffs' attorney stated at oral argument that plaintiffs' primary concern in seeking class certification was to assure that an injunction would be effective throughout the State. For two reasons the Court is persuaded at this time that a class action is unnecessary to achieve this end. First, defendant has represented to the Court that a decision in this case will be implemented throughout the State regardless of whether this is a class action. Second, DPW states that by law its policies must be applied uniformly to all welfare recipients. Accordingly, if the Court enjoins the use of DPW Program Manual VI-C-2, the effect will be to enjoin this provision as to all A.F.D.C. recipients situated similarly to the plaintiffs. Where class certification will have no impact on the

relief requested, class certification is inappropriate. Nelson v. Likins, supra. The Court's Order herein will be a provisional Order, for there is one respect in which class certification might make some difference. Absent class certification, if the case became moot as to the named plaintiffs, there would have to be a dismissal, whereas if there were certification, mootness as to the named representatives would not moot

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the action. Bradley v. Housing Authority of Kansas City, Missouri, [illegible] F.2d 625 (8th Cir. 1975). Plaintiffs seek the class form, not because of any dangers of mootness,[8] but solely because of the desired impact of the injunction and declaration sought. Since that impact will be the same regardless of the existence of a class action, since there does not appear to be any realistic danger of mootness at this time, and since the Court is uncertain as to the probable size of the class which plaintiffs seek to have certified, the Court at this time denies the motion to certify this action as a class action. Should plaintiffs become aware of material changes in the matters noted above, they may renew their motion to have this case certified as a class action; alternatively, the possibility of intervention by other plaintiffs occupying positions similar to those who are now before the Court remains an option to class certification.

II. ABSTENTION -

The circumstance which allegedly mandates abstention is the pendency of three cases before the Minnesota Supreme Court.[9] These cases concern the recoupment, out of disregard income, of prior overpayments relating to non-reporting or late reporting of income tax refunds by A.F.D.C. recipients. The overpayments were caused by recipient error, though such error is not asserted to have been fraudulent. By stipulation in the State court, these three cases will all turn on the decision of one

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case, Steere v. State of Minnesota, which has been extensively briefed and which will be argued orally on October 15, 1975.[10] Defendant informs the Court that other like cases, pending in district courts throughout the State, have been stayed awaiting the decision in Steere. Defendant argues for abstention on: (1) The decision in State court of question of State law may modify or remove the Federal question in this Court; (2) the State cases raise the same Federal question as is posed here: to-wit, the interpretation and application of the Federal Social Securi statutes and the legality thereunder of recoupment from disregard incom

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(3) the decision of the above matters is "imminent;" (4) a decision by this Court would effectively interfere with all pending State court case

A. Whether the decision of questions of State law is likely to modify or remove the Federal question before this Court.

Three pertinent issues are being argued before the Minnesota Supreme Court: (1) whether recoupment from disregard income in the circumstances of those cases violates the Social Security Act and the Minnesota statutes governing disregard income; (2) whether DPW's considering income tax refunds as income violates Federal statutes and regulations; and (3) whether the recoupment of overpayments from A.F.D.C. recipients contravenes the common law of the State of Minnesota.[11] In the first two of these issues, questions of Federal law are involved. The Minnesota disregard income statute is substantively identical to the Federal statute,[12] and there is no suggestion, either in this Court or in the briefs to the Minnesota Supreme Court, that the Minnesota statute has a meaning different from the Federal statute. The second issue is concededly purely Federal in content. Thus, the sole question of State law which might modify the Federal question here is the third issue.

The A.F.D.C. recipients in the State court argue that "Public Assistance which is not fraudulently obtained may not be recouped without specific statutory authorization." As defendant notes, if the State court in Steere were to rest its decision on the ground that State common law did not permit recoupment from welfare recipients unless specifically authorized by statute, then the Federal question before this Court would not need answering. However, (1) because the Federal question here is statutory and not constitutional in nature, (2) because it is quite possible that the State court decision might rest on a ground totally irrelevant to the case before this Court, (3) because even if the State court does decide the case on the State law basis, it is likely that the State court decision will not modify the Federal question before this Court, (4) because it is doubtful that the State court will rest decision on this State ground, and (5) because of what this Court believes is

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controlling Eighth Circuit precedent on this issue, the State's first argument does not form a basis for abstention.

1. The Federal question is statutory.

The fact that the questions raised before this Court concern interpretation of a Federal statute and at this time have no constitutional dimension is a fact of central importance to all aspects of the abstention issues raised here. It is indisputable that one of the crucial foundations of the abstention doctrine is the wisdom of avoiding whenever reasonably possible the decision of constitutional questions which may have been presented unnecessarily or prematurely.

> "The 'doctrine of abstention' established by the Pullman case was based on two well-recognized considerations. By awaiting state action (1) the federal constitutional question posed for federal decision might become unnecessary; and (2) state courts should be given the first opportunity to interpret state statutes." 1A pt. 2 Moore's Federal Practice, paragraph 0.203[1], p. 2103 (1974).

> "The traditional policy of the Supreme Court to avoid unnecessary decision of federal constitutional questions accounts in large part for its general doctrine that what the state law is, if not clear, must first be determined by the governmental organ competent to give a conclusive answer, the state courts, before the federal court proceeds with the federal constitutional issues, if any remain." Id., paragraph 0.203[2], p. 2115.

The vast majority of the Supreme Court cases involve federal constitutional issues. However, even when the abstention doctrine is employed in this policy of avoiding unnecessary constitutional decision, it is utilized sparingly and only after careful consideration of the particular case:

"The judge-made doctrine of abstention, first fashioned in 1941 in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 . . ., sanctions such escape [from the duty of federal courts to decide federal questions presented under the federal question jurisdiction established by Congress] only in narrowly limited 'special circumstances.' [Citation omitted.] Zwickler v. Koota, 389 U.S. 241, 248 (1967).

"We have repeatedly warned, however, that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in 'special circumstances,' [citation omitted]." Harris County Commissioners Court v. Moore, _____ U.S. _____, 43 U.S.L.W. 4222, 4224 (1975).

The Court recognizes that abstention may be appropriate in non-constitutional contexts. However, the circumstances justifying such

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abstention must be not only "special," they must be "exceptional."

> "We turn now from that matter to a related but different problem of when a federal court should stay its hand in a case where no constitutional issues are involved; but an issue of local law is intertwined with or may come in collision with a non-constitutional federal issue.
>
> "It is clear that there are situations, which might appropriately be described as exceptional, where the federal court may, and in the exercise of a sound discretion must, decline to make an adjudication of the local issues." 1A pt. 2 Moore's Federal Practice, paragraph 0.203[2], p. 2115.

The question of abstention is whether the particular facts here fit within a narrowly limited range of exceptional circumstances which would justify this Court in abstaining from deciding an issue of the interpretation of a Federal statute.

2. The State Court decision may rest on a ground totally irrelevant to this case.

One of the particular facts and circumstances here is the existence in the cases before the Minnesota State Supreme Court of the tax refund issue. All of the cases in that Court seem to be tax refund cases, and the Court is led to believe that the other cases stayed in the State district courts are also tax refund cases. A decision by the Minnesota Supreme Court that tax refunds were not properly treated as income under the then applicable Federal regulation would dispose of all those cases and would have no bearing whatsoever on the cases before this Court. In such an event, abstention would constitute a totally useless act.

Defendant Wilkins argues, however, that an amendment to the Federal regulation concerning income and resources has clarified the status of tax refunds as income and has diminished the importance of the tax refund issue in the State courts. Defendant maintains that the tax issue in State court now concerns a regulation which is no longer in effect, and suggests that though the Minnesota Supreme Court may pause to consider that issue, it is far more likely to reach the still live controversy concerning the propriety of recoupment. This Court is not particularly persuaded. If defendant is correct that tax refunds are clearly income under the new regulation, then the State is unlikely to be

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confronted with future controversies concerning recoupment of such refunds, and as to the parties in the State courts the question of future recoupment is as unimportant as is the question of future tax returns. Furthermore, it is not clear that the issue of the proper interpretation of the old regulation is at all unimportant to the State. Judge Amdahl, in the Steere case, noted that perhaps 4,000 recipients of A.F.D.C. in Hennepin County alone receive outside income. The amount of tax returns for these people is undoubtedly substantial. It was because that issue in itself was of paramount significance that the Judge suggested that an appeal of his decision might be appropriate. Defendant's Exhibit A, App. at A-29. The fact that the regulation has been changed does not diminish that significance; the allocation of a large amount of money may rest on the Minnesota Supreme Court's interpretation of the old regulation.

Defendant's argument also overlooks the alternative methods of recoupment available to the State. State regulations permit voluntary repayment, as well as recoupment from disregard income. It seems that all the State cases concern tax refunds, but it is not at all certain that all the State cases also involve involuntary recoupment. As to an A.F.D.C. recipient whose case is pending before a State district court, and who is willing to repay if an overpayment has been made, a decision by the Minnesota Supreme Court that forced disregard income recoupment is improper under the common law, without reaching the tax refund question, would fail to resolve the stayed action. The tax refund issue might resolve all the cases; the common law question might not. One

might predict that with litigation throughout the State stayed pending decision in Steere, the Minnesota Supreme Court will decide Steere in such a way as to resolve all that litigation. 13

3. A State Court common law decision is unlikely to modify the Federal question here.

If the State court does reach the State common law issue, and even if as a matter of State law recoupment is improper in cases of agency caused overpayments, it is possible that the decision of State

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law will be a narrow one and will not reach the agency caused error situation. As noted above, all the State cases appear to involve recipient error, whereas all the cases here involve agency error alone. The State plaintiffs have argued that the State common law invalidates recoupment as to all "non-fraudulently" obtained assistance, absent specific statutory authority. The line thus drawn between the presence or absence of fraud would fit not only the State plaintiffs but plaintiffs here as well within the protection of the claimed common law policy. Defendant Likins, however, argues the State law issue quite differently. Defendant Likins places heavy reliance in her brief on the New Jersey Supreme Court case of Redding v. Burlington County Welfare Board, 323 A.2d 477 (1974). Defendant argues Redding as follows:

> " * * * The Court found that there was no need for specific statutory authority where the overpayment was generated by recipient (rather than administrative) error. . . . Under Minnesota's present recoupment policies, recovery of overpayments is attempted only where, as in the present case, the recipient has caused the mistaken overpayment.
>
> " * * * No specific statutory authority is needed to recoup for overpayments generated by recipient error." Steere v. Minnesota, Doc. No. 45615, Minn. S.Ct., Brief of Respondent at 14-15.

The Minnesota Supreme Court might very well hold merely that State common law does not forbid recoupments in cases of recipient error, without reaching any question whether such common law forbids recoupment in cases of purely agency error. In his carefully considered opinion in Steere, Judge Amdahl took this very approach, citing Redding, and holding precisely and narrowly that in cases of clear recipient error the common law does not foreclose recoupment. Defendant's Exhibit A, App. at A-18-21.

This Court is persuaded by Judge Amdahl's analysis of the merits of the State common law claim. The State court plaintiffs appear to have extracted two broad dicta from one recent and one rather old case, upon which the common law is constructed. Judge Amdahl's careful analysis of the source of those judicial statements suggests that his limiting interpretation is correct and that in all probability State common law does not forbid recoupment in cases of recipient caused overpayments. If this

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Court is correct, and if Judge Admahl's analysis in Steere was correct, then the Minnesota Supreme Court may not express an opinion as to the relation of common law to agency caused error; and even were such an opinion expressed, it would be obiter dictum.

4. It is doubtful that the Minnesota Supreme Court will rest its decision on a State law ground.

More important than the possibility that State law issues may not dispose of this case, however, is the probability that the Minnesota Supreme Court will not rest its decision on a State law ground. As defendant Likins notes at p. 5 of her Memorandum in this Court:

> "In addition, Minnesota's Supreme Court has shown a willingness to reach complex questions of federal and constitutional law in the welfare area, [citations omitted], and thus is expected to grapple with the very issues presently before this Court."

This willingness to grapple with such complex issues seems premised on the Minnesota Supreme Court's perception that at the core of the controversies surrounding the A.F.D.C. program are questions of Federal law, not questions of State law. Plaintiffs here argue that disregard recoupment is violative of Federal eligibility standards. In a similar context the Minnesota Supreme Court made it very clear what law it believes should govern this sort of question:

"At the outset, it is clear that a class of persons eligible for assistance must be determined by reference to Federal standards.

"Thus, it seems clear what while the state may properly attempt its own method of determining the needs of individuals who qualify as caretakers under the Federal statutes, it may not restrict the class of caretaker relatives made eligible by Federal statute.

"While we may not be bound by the Lopez decision, [Lopez v. Vowell, 471 F.2d 690 (5th Cir., 1973), certiorari denied, 411 U.S. 939 (1973), portions of which the Court had just set out verbatim in the prior two columns of its decision] we are inclined to consider it as clearly stating the interpretation that is to be given to the Federal law involved.

" . . . [S]he simply adopted the position that upon remarriage the mother was ineligible for any consideration. This, the commissioner may not do under a proper construction of applicable law by Federal standards." Meagher v. Hennepin County Welfare Board, _____ Minn. _____, 221 N.W.2d 140, 142, 143, 144, 145 (1974).

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In Blue Earth County Welfare Department v. Caballero, _____ Minn. _____, 225 N.W.2d 373 (1974), though not dealing directly with the kinds of issues presented in the present litigation, the Court again expressed a preference for deference to Congressional judgment and demonstrated a judicial sensitivity to the fact that when the State court decides issues pertaining to the A.F.D.C. program, the Court deals with acts "under which Federal funds furnish a large part of the total amount used to finance these programs . . . ." Id., at 385.

The particular circumstances of this case, then, would not seem to disclose the kinds of "exceptional" factors which would call for abstention here:

> "On the other hand, where the litigation has already been long delayed, [citations omitted], or where it has seemed unlikely that resolution of the state law question would significantly affect the federal claim, [citations omitted], the Court has held that abstention should not be required." Harris County Commissioners Court v. Moore, supra, at 4225.

5. Eighth Circuit precedent seems to foreclose abstention here.

Defendant refers the Court to the Second Circuit's decision in Freda v. Lavine, 494 F.2d 107 (2nd Cir. 1974), which defendant believes is dispositive of this case. Freda involved a Federal A.F.D.C. statutory question and not a constitutional question; in Freda the Second Circuit ordered abstention. As plaintiffs note, in Freda there was a very real likelihood that a question of unsettled State law (whether a stepparent was legally obligated to support a stepchild) would dispose of the question of the legality of a State regulation (which included the income and resources of such stepparent as part of the income and resources

available to support the stepchild). For this reason, Freda is a far different case from the one in this Court. 15

Even were Freda more on point, the Court would feel constrained to follow the Eighth Circuit's decision in Barrera v. Wheeler, 441 F.2d 795 (8th Cir. 1971):

> "In the case before us, the 'nub of the controversy' centers on an interpretation of a federal statute. Appellants assert that they are being deprived of federal funds to which they are entitled under a federal law. While there may be an

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> "unsettled question as to whether state law allows appellees to disburse funds for the purposes which appellants urge, a definitive ruling on state law questions would neither control the outcome of the litigation nor obviate the need to adjudicate the issues presented regarding the requirements of the Elementary and Secondary Education Act of 1965 and the constitutionality of appellees' actions in the manner in which they acquire and distribute Title I funds." Id., at 800-801.

While Barrera dealt with an educational program rather than with the A.F.D.C. program, it is clear that in the opinion of the Eighth Circuit the two programs are strikingly similar. A second issue in the Barrera case was exhaustion of administrative remedies. The Circuit Court held that Rosado v. Wyman, 397 U.S. 397 (1970), an A.F.D.C. case, was dispositive of the exhaustion issue, in large part because the structures of the A.F.D.C. program and the educational program are so very nearly identical. Barrera, supra, at 799-800. The conclusion is inescapable that a similar parallelism exists as to the abstention issues. The Court is aware of no judicial decision which has disputed the fact that in a case such as this the "nub" of the controversy is interpretation of a Federal statute. See also, Part II, B., immediately infra.

Generalized principles of federalism, moreover, formed some basis for abstention in Barrera, for the issue of State law there was a matter of such intense local controversy that the attorney general of the State declined to represent the State in the Eighth Circuit, and again declined to represent the State before the United States Supreme Court. Wheeler v. Barrera, _____ U.S. _____, 94 S.Ct. 2274, 2281, n.9 (1974). The State

court plaintiffs in Steere, on the other hand, are able merely to point to two broad dicta in support of their common law claim.

B. Whether this Court should abstain because of the existence of a federal question in cases pending before the Minnesota Supreme Court, which federal question is similar to the issue presented to this Court.

Steere poses the question of whether recoupment from disregard income in cases of recipient error is permitted under the Social Security Act and under the Minnesota statutes. A similar question is presented here. Defendant argues that this forms a basis for abstention. For the following

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reasons this Court cannot agree that the mere fact that a similar Federal question is presented to a State court is sufficient ground to justify abstention.

It should be reiterated that this is not that type of case wherein a Federal non-constitutional issue is intertwined with a matter of intense local concern, and where, because of the intensity of that peculiarly local concern, abstention is called for in order to allow the State courts to hear the entire case in the first instance.

> "Similarly, when the state law questions have concerned matters peculiarly within the province of the local courts, [citations omitted], we have inclined toward abstention." Harris County Commissioners Court v. Moore, supra, at 4224-4225.

Nor is the interpretation of the Federal statute itself a matter "peculiarly within the province of the local courts."

> "In conclusion, we add simply this. While we view with concern the escalating involvement of federal courts in this highly complicated area of welfare benefits, one that should be formally placed under the supervision of HEW, at least in the first instance, we find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field. It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." Rosado v. Wyman, supra, 397 U.S. 422-23.

Federal court jurisdiction is "traditional" and is "peculiarly" a matter of "duty" in this area. And if it is wise to take such cases out of the Federal courts, wisdom indicates that the cases should be lodged in Federal administrative agencies.

The mere existence of a Federal statutory question in a separate State court proceeding has never been an adequate basis for abstention. As the United States Supreme Court noted in Harman v. Forssenius, 380 U.S. 528, 535 (1965):

> "Thus, 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.'" England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415-16, 84 S.Ct. 461, 465, 11 L.Ed.2d 440.

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It is the existence or nonexistence of unresolved questions of State law which is absolutely central to the applicability of the abstention doctrine:

> "But the abstention rule only applies where 'the issue of state law is uncertain.' [Citation omitted] Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. [Citations omitted] . . . . Hence the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in Zwickler v. Koota, [Citation omitted], abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. [Citation omitted] We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal court should stay its hand and not decide the question before the state courts decided it." Wisconsin v. Constantineau, 400 U.S. 433, 439-40 (1971).

A "naked" question of Federal law, even of Federal constitutional law, should be decided by the Federal courts. Not to do so is to breach the duty of the Court to decide questions properly posed within its jurisdiction.

Abstention would not dispose of the case here; it would merely postpone this Court's consideration of the Federal claims.

> "It need hardly be added that the state courts in such a proceeding can decide definitely only questions of state law that are not subject to overriding federal law." Leiter Minerals v. United States, 352 U.S. 220, 229-30 (1957).

Though this Court does not doubt that a State court decision on the Federal issue would be instructive and in all likelihood highly persuasive, it would not be authoritative. After abstention was over, the same issues would remain as had been here before, as are here now, and would remain largely, if not completely, unchanged.

Nor are generalized principles of comity and federalism in any manner offended by a decision not to abstain. As the Minnesota Supreme Court noted in Meagher, supra, its decision in that case was not authoritatively controlled by the opinion of the Fifth Circuit Court of Appeals on a question of Federal law. See, not only Meagher, but United States v. Woods, 432 F.2d 1072 (7th Cir. 1970); and Iowa National Bank v. Stewart,

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214 Iowa 1229, 232 N.W. 445 (1930). Failure to abstain can carry no suggestion of any disrespect for the Minnesota Supreme Court's ability to deal with the difficult questions presented both here and there.[16]

The Federal recoupment questions presented here and in the Minnesota Supreme Court are not precisely the same. The first obvious difference is that in this Court all overpayments were the result of agency error, whereas in the State courts the overpayments resulted from recipient error. It is true that the relevant HEW regulation differentiates two classes of recoupment--one from those who have been "wilful" and the other from those who have not been "wilful."[17] If "wilfulness" is considered to be tantamount to fraud, then cases of agency error and cases of non-fraudulent recipient error are indistinct--the statute, as interpreted by the same Federal regulation, applies to both categories identically. It is not clear, however, that in Steere wilfulness and fraud can be equated. Judge Amdahl noted that, "While there may be no allegation of fraud, certainly appellant was mistaken in not notifying the county at the time she received her income tax refund as she had been requested to do."[18] Defendant's Exhibit A, App., at 18-19. Not only was appellant in Steere "certainly . . . mistaken," the administrative record before the State Supreme Court contains the following conclusion of the State Appeals Referee and of James J. Hiniker, who signed as representative of Vera J. Likins:

> "We do find that the petitioner is attempting a circuitous route of bypassing responsibility for accounting for her income tax refund." Id., p. A-8.

Although Judge Amdahl decided the Steere District Court appeal on the basis of 45 C.F.R. § 233.20(a)(12)(i)(A)(1) which concerns non-wilful recoupments, and although both parties in Steere have submitted the Federal recoupment question to the Minnesota Supreme Court on the basis of this same Federal regulation, it is not clear that this is the governing regulation. The Minnesota Court might well decide Steere on the basis of 42 U.S.C. § 602(a)(8) as interpreted by 45 C.F.R. § 233.20(a)(12)(i)(A)(2) (the regulation authorizing recoupment from recipients whose conduct has been "wilful").

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Even if Steere is decided on the assumption that recipient error there is non-wilful, the regulations which bear on that statutory interpretation are significantly different for the Minnesota Supreme Court and for this Court. In both cases, the State attempts to recoup from disregard income. In both cases the same recoupment regulation is applicable:

> "(a) The State may not recoup any overpayment previously made to a recipient:
>
> (1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payment . . . ." 45 C.F.R. § 233.20(a)(12)(i)(A)(1).

In interpreting this regulation, however, a key question is the role of disregard income in relation to "income or resources exclusive of the current assistance payment currently available." And the "income and resources" regulation applicable at the time of the Steere recoupments is materially different from the regulation currently applicable and which this Court must interpret.

It is axiomatic that great weight should be accorded the judgment of the administrative agency given responsibility for administering a Federal statute. E.g., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). Whether Steere is treated as a case of wilfulness or non-wilfulness, the Minnesota Supreme Court's interpretation of 42 U.S.C. § 602(a)(8) will occur in a context of Federal regulations significantly different from the regulations involved here. The contours of the statutory interpretation questions here and there are likewise significantly different.

In sum, the Court finds no precedential support for, and no basis in reason or logic for, abstaining under point "B" of defendant's argument. This is a question of Federal statutory law, and the Court is duty bound to exercise jurisdiction which Congress has clearly conferred. Not only would a decision by the Minnesota Supreme Court not foreclose a contrary decision here, and not only would the decision of this Court not foreclose a contrary decision by the Minnesota Supreme Court, but on close examination the precise issues here and in the State courts are not the same.

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C. Whether the claim that decision of the Steere case is "imminent" forms a basis for abstention.

The decision in Steere will have no direct impact on the litigation pending here. Steere may be persuasive; it will not be binding. The Court is aware of no principle of law which indicates that a court of equity should stay its hand in issuing a preliminary injunction because another court in a separate jurisdiction may announce a decision which may be persuasive or instructive as to the issues underlying the preliminary injunction.

Defendant points out that the court in Freda, supra, took cognizance of the existence of pending State court litigation in the course of its decision to order abstention; defendant also refers the Court to the following passage from the United States Supreme Court's decision in Harris County, supra, at 4224:

> "Where there is an action pending in a state court that will likely resolve the state law questions underlying the federal claim, we have regularly ordered abstention."

These references from Freda and Harris County are both in the mainstream of abstention doctrine cases. Both concerned cases where unsettled questions of State law might well alter the Federal question. This is the single factor which is closest to being the touchstone of abstention cases. It is a factor largely absent here.

Harris County concerned an abstention which served the purpose of avoiding decision of a constitutional issue. Each of the cases cited in support of the above quotation from the Harris County decision was likewise a case involving a constitutional issue. The importance of there being an action pending in State court derives in part from a central problem of the abstention process: the likelihood that abstention may lead to unconscionably long delay in the enforcement of important Federal rights. Harris County, supra, at 4224. The fact that a State case is pending is not an independent basis upon which a Court can order abstention. It is merely one of the totality of facts which the Court must examine. When the issue is not constitutional, and when State law is not "likely" to affect the issue, the central impetus to abstain is absent.

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Freda v. Lavine, supra, was concededly not a constitutional case; abstention did not involve avoidance of a constitutional issue. The Freda court ordered abstention in order to allow the State courts to decide a question touching on domestic relations, a matter which has long been understood to be of peculiarly local concern. Moreover, the validity of the New York regulation was intertwined with the undecided question of State law concerning the rights and duties of stepparents. That decision of local domestic law would probably be dispositive of the Federal statutory question: if the stepparent was obligated to support the stepchild, the regulation was valid under Federal standards; if the stepparent was not obligated to support the stepchild, the regulation was invalid under Federal standards. To decide the Federal question would have been to decide an unsettled question of peculiarly local law. Here the local law issue is not intertwined with the Federal law issue. In the non-constitutional and non-peculiarly-local and non-intertwined context of the present case, the fact that the State court proceedings are presently pending is not a matter of great moment. Such a bare claim that the pendency of Steere is itself enough to warrant abstention was effectively put to rest in a case having a strikingly similar posture to the instant case. Moya v. DeBaca, 286 F. Supp. 606, 607 (D. N.M. 1968) (3-Judge Court), appeal dismissed per curiam, 395 U.S. 825. There is no warrant for a different conclusion here.

D. Whether this Court should abstain because a decision here would effectively interfere with pending State court cases.

Defendant suggests that a decision by this Court would in effect abort the cases now pending before the Minnesota Supreme Court, and would likewise abort those other district court cases which have been stayed pending decision in the Minnesota Supreme Court. All parties concede that this case is factually dissimilar to Younger v. Harris, 401 U.S. 37 (1971), and Huffman v. Pursue, Ltd., _____ U.S. _____, 43 U.S.LW. 4379 (1975). The Court is not asked to enjoin a pending criminal or quasi-criminal proceeding; this is not the case of a State court litigant

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running to Federal court in an end run of the State's judicial processes. Any decision of this Court must be implemented uniformly within the State agency. Thus, a decision concerning only the litigants here may nonetheless disrupt the litigation in other courts if defendant Likins is forced to implement agency-wide policies which substantively coincide with the demands of the State court plaintiffs and which are substantively fatal to defendant Likins' State court positions.[20] Because this Court does not believe that its Order will result in such disruption of pending State court cases, it does not feel compelled to abstain under this fourth arm of defendant's abstention argument.

The Federal question of statutory interpretation is not the same in this Court as it is in the State courts. An Order in this case that recoupment from disregard income of recipients of agency caused overpayments is invalid would not necessarily have any bearing on the agency's rights, under a former regulation, to recoup in cases of recipient error, and would not necessarily have any bearing on the agency's right to recoup in cases of wilfulness. Furthermore, nothing this Court decides will have any bearing on the tax refund issue in the State courts. Whatever this Court may finally do on the merits of the Federal recoupment question, the State common law recoupment question remains for determination by the State court. This case is not presented at this time for a decision on the merits of even the narrow Federal question. Plaintiffs move for a preliminary injunction, and the Court must decide not the merits, but merely whether there is a substantial probability of eventual success on the merits.

Even if this Court were not to deal with any of the State court issues, even if it did not purport to express an opinion as to the probable merits of any claim in State court, if it nonetheless issued a preliminary injunction which had the practical effect of ending the State court litigation, this Court would seem to be intruding in a major way in all the matters before the State courts.[21] As to the coercive effect of the issuance of an injunction, the Court notes first that it has been made

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acutely aware of the pendency of the State court cases. This Court is desirous of not interfering with such proceedings. The issues presented here have been framed narrowly: whether recoupment from disregard income in the case of agency caused overpayments is proper. Any preliminary injunction would accordingly be narrowly limited to forbidding recoupment from disregard income in cases of agency-only error.

III. PRELIMINARY INJUNCTION

A. Three Preliminary Criteria.

> "It is hornbook law that the following factors must be considered by this Court as it deliberates over the appropriateness of injunctive relief: plaintiffs' probability of success on the merits; immediacy and irreparability of the harm if the injunction is not granted; the harm that will be suffered by the defendants if the preliminary relief is granted; and the effect of the injunction on the public good." Nelson v. Likins, supra, 389 F. Supp. at 1237.

The Court will consider the latter three factors first.

It is apparent that the harm suffered by an A.F.D.C. recipient when a monthly allotment is reduced is far greater than the harm which normally attends losses of money. In Nelson, supra, the Court found that such monetary reduction was itself sufficient to establish irreparable harm. The Eighth Circuit, in a per curiam opinion, affirmed issuance of a preliminary injunction, taking specific note of Judge Lord's well reasoned opinion. In this Court's view such monetary loss is sufficient to establish irreparable harm and that such loss constitutes irreparable harm as a matter of law. Id.

Defendant suggests that this case is decisively different from Nelson and notes that the impact of Edelman v. Jordan, 415 U.S. 651 (1974) is different here. In Nelson administrative appeals had been foreclosed and thus not only could a Federal court not order monetary repayments, but plaintiffs were prevented at the State level from preserving a claim to prior monies withheld. In the instant case administrative appeals are being processed and monies withheld during the pendency of such appeals may be recovered in the event that the appellant succeeds on the merits. These facts are not decisive. In Nelson, the Edelman limitation and the State appellate foreclosure were characterized as "additional" factors

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which made irreparability of harm "more obvious." Nelson, supra, 389 F. Supp. at 1237. Judge Lord considered the monetary loss itself to be sufficient to establish irreparable harm. In the subsequent motion for a stay pending appeal in Nelson, Judge Lord made it very clear that the ability later to recover money withheld is no adequate remedy for the harm suffered at the time of the withholding:

> "[T]he present loss of $80 to $100 per month in AFDC benefits to these recipients is not, in light of the fact that they are now subsisting on low welfare benefits, a loss which in any practical manner could be replaced some months hence should the Commissioner fail to succeed on appeal." Id., 389 F. Supp. 1242.

In the instant case actual recoupments begin upon the affirmance of the county agency by the county appeals referee. Though plaintiffs may preserve a possible right to recover payments withheld by pursuing State administrative and judicial appeals, plaintiffs are, and soon will be, subjected to actual recoupments which are causing or will cause them irreparable harm.

Defendant attempts to distinguish Nelson on a second ground. Defendant asserts that Nelson involved a recalculation of the standard of need, whereas the present case involves recoupment from funds available in excess of the standard of need. As the Eighth Circuit noted in Nelson, Commissioner Likins' attempt to recalculate the standard of need "was an effort to correct inequities in the administration of the A.F.D.C. program." Id., 510 F.2d at 414. The "inequity" was that A.F.D.C. recipients who shared households with S.S.I. recipients received monies above and beyond the standard of actual need. Defendant's reductions in

Nelson did not reduce the recipients' net income to a level below "actual" need; the reductions came from "excess" income. Both Judge Lord and the Eighth Circuit recognized this fact; both found irreparable harm. This Court likewise finds irreparable harm, both because of the precedential value of Nelson and because of the facts disclosed in this case.

Plaintiffs assert that they have developed expectations based on the earning of disregard income, expectations of being able to live above a level of minimum subsistence, expectations which have manifested

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themselves in the incurring of fixed monetary obligations which would not otherwise have been undertaken but for the existence of the disregard income. The Court believes that the provision for disregard income in Federal law does give rise to a justifiable expectation on the part of working A.F.D.C. recipients in some States that they may live somewhat above minimum subsistence.[22] An A.F.D.C. recipient with disregard income who uses this "excess" income[23] for various purposes has legally protectable expectations; and this Court will not require that the recipient be reduced below the level of subsistence before a preliminary injunction will issue in order temporarily to protect those interests pending further examination of whether Federal law mandates that those interests not be invaded for purposes of recoupment. Plaintiffs' affidavits suggest that just such interests are being threatened. As a matter of fact and as a matter of law, a finding of irreparable harm is warranted.

Defendant raises one final argument here which was not presented in Nelson. Defendant notes that DPW provides a wide range of supplemental services and subsidies to the A.F.D.C. recipient in order to assure that the recipient's needs are met. Defendant argues that given this range of back-up support services, no A.F.D.C. recipient who is subject to recoupment and who has disregard income can conceivably suffer irreparable harm. The Court is not persuaded that these services, though impressive in scope, are decisive of the issue of irreparable harm. The majority of the services mentioned (medical assistance, food

stamps, day care, school lunch, housing subsidies) are presumably generally available to all A.F.D.C. recipients, both before and during recoupment. These are not special programs, but rather are part and parcel of the entire A.F.D.C. program. Presumably the State is well aware of the existence of these programs when it calculates its standard of need and when it determines to pay 100% of that standard.[24] The only special program available to deal with the problems of plaintiffs here is the emergency assistance program, which defendant characterizes as the program

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"designed to rectify the very ha[illegible]" Defendant's Reply Memorandum, p. 8. The creation of the need for emergency aid, that is, the creation of an emergency in the life of an A.F.D.C. recipient, is highly probative evidence of the existence of irreparable harm. Defendant has not provided a schedule of the amounts of emergency aid which may be paid; however, the Minnesota and Federal statutes indicate that such aid is inadequate to prevent irreparable harm here. The Minnesota Statute § 256.871 is substantively identical to the Federal statute set out below:

> "The term 'emergency assistance to needy families with children' means any of the following, furnished for a period not in excess of 30 days in any 12-month period, . . . but only where . . . the payments, care, or services involved are necessary to avoid destitution of such child . . . ." 42 U.S.C. § 606(e)(1) (1975).

A program to avoid destitution during a maximum period of 30 days out of 365 is non-responsive to plaintiffs' assertions of irreparable harm which concern expectations somewhat above the destitution level and which concern threatened invasions of interests, which invasions will be continuous and prolonged and not limited to a 30 day period.

The harm suffered by the defendant and the impact on the public good are both matters which turn ultimately on the probability of success by plaintiffs on the merits. If plaintiffs are likely to succeed on the merits, defendants will not suffer harm to any legitimate claim to recoupment. Even were a preliminary injunction to issue now, and even were defendant ultimately to prevail on the merits, the sole effect would be that recoupment would be delayed.

Both parties clothe themselves in the public interest. Defendant notes a Federal concern with quality control of the A.F.D.C. bureaucracy and asserts a public right for the State to take reasonable steps to retrieve past erroneous depletions from the public fisc. Defendant thus raises quite fundamental concerns of administrative and fiscal integrity and claims that the public good requires that the recoupments here undertaken not be suspended. Plaintiffs point to a preeminent public interest

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expressed in the A.F.D.C. program for the care of dependent children, and plaintiffs take note of a number of court decisions which affirm the principle that what the Congress has mandated as to use of Federal monies in A.F.D.C. programs, the States cannot contravene for reasons grounded in other aspects of the public good. Plaintiffs assert that 42 U.S.C. § 602(a)(8) is an expression of public policy which Congress has mandated shall override the public policy claims of defendants here. The Court's assessment of the probability of success on the merits will itself involve the question of which public interest must be preferred in the circumstances of this case. As is common in such cases as this, then:

> "[T]his factor and in reality the appropriateness of injunctive relief depends on the factor of probability of success on the merits." Nelson v. Likins, supra, F. Supp. at 1238.

B. Probability of Success on the Merits.

It is important to clarify what this case does not involve, and what it does involve. The motion for a preliminary injunction and the complaint's prayer for relief, paragraph 4, seek an injunction forbidding recoupment from one-half of disregard income in cases of prior overpayments which were caused by agency error. As should be clear from discussion of the abstention issue above, this question is a very narrow and precise one. However, the parties have argued at some length whether as a general matter "recoupment through grant reduction is contrary to the provisions of the Social Security Act." This broad proposition is not particularly helpful in resolving the precise issue posed. The Court is not concerned with whether "recoupment through grant reduction" is or is not authorized in all possible cases--in cases, for example, of fraud, or in cases where a recipient has received a windfall or otherwise has available excess monies.

None of the caselaw cited and argued by the parties is truly dispositive. Plaintiffs assert that recoupment is improper in that recoupment presumes the continued existence of resources which are no longer available, citing N.W.R.O. v. Weinberger, 377 F. Supp. 861 (D. D.C. 1974);

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and Cooper v. Laupheimer, 316 F. Supp. 264, 269 (E.D. Pa. 1970). Defendant does not claim to be recouping from the prior overpayments and does not assert that such overpayments still exist or form the resources from which recoupment is effectuated.

Eligibility for A.F.D.C. benefits must be based on need and dependency, and any other standard of eligibility must be very closely scrutinized. See, e.g., Townsend v. Swank, 404 U.S. 282, 286 (1971). Defendant recoups solely from disregard income, and then only from one-half of such income. The basic standard of need of A.F.D.C. recipients is never invaded by this recoupment regulation, and this is thus clearly not a regulation whose only victim is the needy child. Such cases as Cooper v. Laupheimer, supra; and Van Lare v. Hurley, _____ U.S. _____, 43 U.S.L.W. 4592 (1975), are largely inapposite; and the central thrust of such cases as King v. Smith, 392 U.S. 309 (1968), requiring eligibility to be based on need, likewise provides little direction here.

On the other hand, there exists a cluster of cases, such as Dandridge v. Williams, 392 U.S. 421 (1970), which provide a counterweight to the Van Lare v. Hurley/King v. Smith principle and which indicate that where Congress has not spoken in mandatory terms in the Social Security Act, the States are free to pursue their own policies and to limit and condition benefits according to their own social judgments so long as congressional mandates are respected and congressional purposes are not undermined. The broad principle upon which these cases rest is likewise not dispositive of this case for it is clear that the income disregard provision of 42 U.S.C. § 602(a)(8) is mandatory upon the States. Mr. X v. McCorkle, 333 F. Supp. 1109 (D. N.J. 1970), affirmed in relevant part, sub nom Engleman v. Amos, 404 U.S. 23 (1971).

The issue for this Court finds its birth somewhere between the origins of Van Lare and Dandridge. The approach must be to define the precise scope of the mandate of § 602(a)(8) in relation to the facts. If the mandate is so broad as to reach these recoupments of overpayments in cases of agency error, then such recoupments are invalid; if the mandate

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is not this broad, then the States are largely free, at least as far as § 602(a)(8) is concerned, to pursue goals of their own.

The case of Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971), provided some hope of being dispositive here, for there the court clearly held that recoupments from disregard income of past overpayments were proper. However, this holding was undeniably premised on the assumption that the disregard income provision of the Social Security Act was not mandatory on the States. This assumption is authoritatively rebutted in Mr. X v. McCorkle, supra. An opinion which erroneously assumed that there is no mandate in 602(a)(8) does not help to define that mandate.

State court cases cited by the parties are of little help in the primary task of interpretation here. Redding v. Burlington County Welfare Board, supra, involved recovery of overpayments in a civil suit. The broad proposition that "recovery from those who become able to pay" is proper sheds no light on a proper interpretation of § 602(a)(8). The closing dictum from Wilson v. Lavine, _____ N.Y. App. Div.2d _____, (Feb. 25, 1975), that the welfare department would "ordinarily be entitled to seek a limited recoupment" is of no help in determining just what the nature of that limitation is. And as noted supra in discussion of abstention, the question of recoupment presented to the Minnesota courts is slightly different from the question of statutory interpretation posed here.

The arguments and briefs have not disclosed any judicial authority which has adequately disposed of the question presented. Following the McCorkle decision's undermining of Bradford, this is now a case of first impression. The case raises difficult questions of statutory interpretation. These questions arise against a backdrop of a conflict of public interests: on the one hand, the need of the State to recoup overpayments not authorized by law, and its desire to recoup solely from monies not essential to the maintenance of A.F.D.C. recipients; on the other hand, the expressed purpose of Congress, in the provision for meaningful work incentives, to encourage those receiving A.F.D.C.

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benefits to work and to become eventually self-supporting and disentangled from the need to receive welfare benefits.

The starting point is the words of the statute itself, 42 U.S.C. § 602(a)(7) and (8) (1975):

> "(a) A State plan for aid and services to needy families with children must . . .
>
> * * *
>
> (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . .
>
> (8) provide that, in making the determination under clause (7), the State agency--
>
> (A) shall with respect to any month disregard--
>
> (i) . . . .
>
> (ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual . . . whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month . . . ."

Whatever may be the effect of these words, it is clear that the word "must" in clause (a) means that the remaining words are mandatory upon the States. Mr. X v. McCorkle, supra.

The key phrase to be interpreted is the phrase "in making the determination under clause (7)." The reference to clause (7) is unambiguously a reference to "in determining need." Furthermore, the reference is to the "determination" which results from the completion of the en-

tire clause (7) operation, and part of the process of making that determination is the "tak[ing] into consideration [of] any other income and resources . . . ." The probability of success on the merits turns on the answer to these questions: when does a State agency determine need, and when does a State agency take into consideration other income and resources as a part of this determination? When the State agency does these things, it must disregard $30 plus one-third of income.

The parties differ sharply as to whether the State's recoupment of

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disregard income involves a clause (7) determination of need. Defendant Likins argues that she does uniformly disregard the required amounts of income in determining need and in determining the amount of the assistance payment. Before the agency takes account of the fact that there has been a prior overpayment, the rate of benefit payment fully reflects the income disregard, and that payment amount is the amount which the recipient regularly receives. It is only after this basic payment amount has been determined that the State asserts its right to a limited recoupment. The recipient has a right to a regular payment which is based on the clause (7) determination of need, but the DPW also has a right to recoupment, a right which is separate from the recipient's right to payment, and a right which is not based on a determination of need. Rather, recoupment is based solely on two factors: (1) the fact of and amount of the prior overpayment, and (2) the amount of currently available income and resources exclusive of the assistance grant. Plaintiffs argue that defendant's policy of recoupment from disregard income is based precisely on a judgment that the A.F.D.C. recipient does not truly need that income. The determination to recoup is itself a determination regarding need. Plaintiffs point out that defendant in this Court again and again refers to disregard income as "excess" income, income that is in excess of the State's standard of need. A claim that this recoupment is permissible because it does not reduce a recipient below the level of need is a claim inextricably premised on a determination of what the recipient needs. Given this dispute between the parties, it is at least clear that the clause (7) "determining need" language is ambiguous.

Though the Court, in light of this ambiguity, will examine the legislative history and administrative practice relevant to the issues, it begins with the observation that defendant has considerable difficulty avoiding the force of plaintiffs' argument. Defendant has justified her recoupments primarily on the ground that no actual reduction below need occurs. Admittedly, this ex post facto justification does

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not constitute an admission that the initial process involves need determinations; but the recoupment plan itself does seem designed to avoid the problems which have arisen for States which have recouped below the level of need. It seems to this Court that the concept of "need" is central to every aspect of the A.F.D.C. program. It seems odd that a State agency would claim that the amount which is paid to an A.F.D.C. recipient is not based on a determination of need. The United States Supreme Court, in explicating § 602(a)(7) and the regulations which implement it, noted that the amount an applicant is paid is based on a § 602(a)(7) determination, and upon a determination of need.

> "Under HEW regulations all AFDC plans must specify a statewide standard of need, which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level. Both eligibility for AFDC assistance and the amount of benefits to be granted an individual applicant are based on a comparison of the State's standard of need with the income and resources available to that applicant. 45 CFR § 233.20(a)(2)(i). The 'income and resources' attributable to an applicant, defined in 45 CFR § 233.20(a)(6)(iii-viii), consist generally of 'only such net income as is actually available for current use on a regular basis . . . and only currently available resources.' 45 CFR § 233.20(a)(3)(ii)(c) . . . . In determining net income, any expenses reasonably attributable to the earning of income are deducted from gross income. 42 U.S.C. § 602(a)(7). If, taking into account these deductions and other deductions not at issue in the instant case, the net amount of 'earned income' is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference. 45 CFR § 233.20(a)(3)(ii)(a) and (c)." Shea v. Vialpando, 416 U.S. 253-54 (1974).

The § 602(a)(7) operation is the operation by which the amount of the assistance payment is calculated. By saying in § 602(a)(8) that the income disregard shall not be considered in the (a)(7) determination, Congress was stating that the income shall be disregarded in determining the amount of the assistance payment. Defendant's assertion that her redetermination of the amount to be paid does not involve a determination of need is, on its face, rather incredible.

The legislative history and the administrative interpretations of § 602(a)(8) bear out the Court's initial impression that Congress intended that the disregard income be disregarded whenever an A.F.D.C. payment is made. The legislative history of the income disregard

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section, and the congressional purpose in regard to such section, were thoroughly analyzed by the three-judge district court in Mr. X v. McCorkle, 333 F. Supp. 1109, 1115-17, supra:

> "This 'income disregard' provision of section 402(a)(7) was added to the legislation as part of the 1968 amendments. It was one of a number of amendments to the Social Security Act intended to increase payments to recipients because of the rise in the cost of living, and to encourage individuals who had been receiving public assistance to seek employment . . . .
>
> * * *
>
> Section 402(a)(8) stipulates that certain amounts of earned income shall be disregarded when a state, as it must in accordance with § 402(a)(7), considers the 'other income and resources' of an applicant in order to determine need. This provision was intended as an incentive to welfare recipients to seek employment. It was part of a congressional effort made to ensure that an applicant not find it more advantageous to remain on welfare than to seek employment. The legislative history reveals a concern among the Congressmen that one of the stated goals of the program--'to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care'--was not being achieved.
>
> The Senate Finance Committee stated that disregarding some portion of earned income was essential to implement this objective. The Committee in its report explained: 'A key element in any program for work and training for assistance recipients is an incentive for people to take employment . . . .
>
> * * *
>
> 'There is no doubt, in the opinion of the committee, that the number of recipients who seek and obtain employment will be greatly increased if, in conjunction with the work incentive program, there may be added to title IV some specific earnings incentives for adults to work. The Department of Health, Education and Welfare has informed the committee that research and demonstration projects have illustrated that more recipients will go to work when an incentive exists.'
>
> The report continued to state that, 'the committee believes that this provision will furnish incentives for members of public assistance families to take employment and, in many cases, increase their earnings to the point where they become self-supporting.' . . . .

* * *

The legislative history reveals the general purpose of section 402(a)(8), and the language of the section is quite specific. It denominates an amount, $30, and a proportion, one-third of the individual's earned income, which must be disregarded before determining need.

If Congress were willing to allow states to devise methods of encouraging employment by developing their own formulae, the statute could have been so written. As it exists today, however, it is a particular directive mandating that states follow a specified formula. No other scheme would comply with the statute."

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"Only in situations which meet the exceptions of 402(a)(8)(C) and 402(a)(8)(D), can a state fail to disregard the statutory amounts." 28

The Court's holding respecting income disregards was affirmed by the United States Supreme Court. Engleman v. Amos, supra.

What seems clear from the legislative history of § 602(a)(8) is that the A.F.D.C. program now is organized to accomplish at least two paramount objectives concomitantly: to provide for the needs of dependent children while at the same time encouraging assistance recipients to take employment. By tying income disregard to the determination of need, Congress seems to have been expressing its intention that these two policies be of equal force. If defendant violates the Social Security Act, it is not because, as plaintiffs maintain, she ignores an eligibility factor or a need factor--it is rather because she ignores a mandatory employment incentives requirement which is statutorily intertwined with such need factors.

The employment incentive objective has become a part of the warp and woof of the A.F.D.C. program. The statutory expression of purpose supporting this objective is 42 U.S.C. § 601's "maximum self-support and personal independence" language. At the same time that the income disregard clause was added to the Social Security Act on January 2, 1968, similar or identical language of purpose was added to § 602(a)(14) and to § 606(d) (both sections concern family services programs). Section 625 was added, providing for child welfare services; one of the services

specified is "protecting and promoting the welfare of children of working mothers." Income disregard was thus introduced in conjunction with family service programs and child welfare programs which were to be designed to facilitate the employment which the disregard was designed to encourage; and this was done in the specific context of reiterations of the congressional purpose of encouraging self-support and independence. HEW has issued extensive regulations implementing this congressional purpose. 45 C.F.R., see especially §§ 220 and 221 (October 1, 1974). In the Senate Committee's language income disregard is an "essential" and a "key" thread in this work incentive fabric.

Congress may judge that the income disregard work incentive is absolutely essential to the total A.F.D.C. program and may provide that the disregard of slightly over $1.00 in every $3.00 earned is the amount which shall be disregarded. There is a substantial probability that Congress has so provided and that disregard of only $1.00 of every $6.00 earned in cases of recoupment of agency-caused-overpayments contravenes the congressional mandate. Whether circumstances change, whether some countervailing factor may emerge, when there is a recipient error or when there is recipient wilfulness or fraud, the Court expressly declines to consider.

Nelson v. Likins, supra, and Van Lare v. Hurley, supra, are helpful in analyzing the claim of DPW that when it makes the recoupment redetermination of the amount to be paid it is not determining need and is not considering income and resources connected with the assistance grant. Both cases involved a State's regulation regarding persons living in the household of an A.F.D.C. recipient--in Nelson, the person was an S.S.I. recipient; in Van Lare, the person was one who had no obligation of support but was allowed to live in the household. In each case Federal statutes or regulations forbade the States from taking account of such persons' income and resources in determining assistance payments to the A.F.D.C. recipients. In each case the State regulation proceeded by indirection: in Nelson the grant was reduced by the State's treating the situation as a "shared household;" in Van Lare the State reduced the housing grant by applying its "lodger" regulation. It was clear to the courts, and as much as admitted by the litigants, that inherent in these regulations was

a consideration of the income and resources of the extra persons. Consideration of income and resources by indirection is nonetheless consideration of income and resources. So here, inherent in DPW's recoupment regulation is a determination of need. Need determination is so inherent in the regulation that DPW has been unable to argue the validity of that regulation without becoming deeply enmeshed in considering the needs of A.F.D.C. recipients and in considering the income and resources of such

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recipients in relation to their needs. When a State concerns itself with the need of A.F.D.C. recipients, it must pay heed to Federal work incentive policies as well.

DPW argues that Federal regulations specifically authorize the recoupments it has provided for. The Court does not agree. The recoupment regulation which pertains to plaintiffs is to be found in 45 C.F.R. § 233.20(a)(12)(i)(A)(1):

> "(A) The State may not recoup any overpayment previously made to a recipient:
>
> (1) unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments: . . . ."

DPW argues that disregard income, being income in excess of the standard of need, is income exclusive of the current assistance payment, for such payment is reduced dollar for dollar only with regard to non-disregard income. This income, being in excess of need, is in every practical sense currently available, and is available in twice the amount by which the agency proposes to recoup. Though this position has an undeniable logic, it fails sufficiently to inquire into the true meaning of "income or resources exclusive of the current assistance payment currently available."

For a specific discussion of this term the Court turns to the revised "income and resources" regulation:

"45 C.F.R. § 233.20 Need and amount of assistance.

(a) Requirements for State Plans. A State Plan . . . must . . .

* * *

(3) Income and resources . . .

* * *

(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:

(a) in determining need, all remaining income and resources shall be considered in relation to the State's need standard;

(b) in determining financial eligibility and the amount of the assistance payment, all remaining income and resources may, at the State's option, be considered in relation to the State's need standard, or the State's payment standard;

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"(c) [illegible] provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their need as determined by the State's need standard;

(d) net income available for current use and currently available resources shall be considered . . . .

Effective date. These regulations shall be effective June 17, 1975." Federal Register, Vol. 40, No. 54, March 19, 1975.

This regulation is doubly fatal to defendant's contentions. First, clauses (ii) and (ii)(b) make clear that the assistance payment is determined with regard to the income disregard, and that disregarded income for that reason cannot be considered as income which is "exclusive" of that payment. Defendant's interpretation of the recoupment regulation provides no principled stopping point which would limit permissible recoupment to anything less than all of a recipient's income. All income, regarded or disregarded, is in one sense "exclusive" of the assistance payment, for such income is not identical to the payment itself. If "exclusive" has this meaning, then all income could be recouped. But defendant would say that "regarded" income is different, for if such income "were not there" the grant would be increased by an equal amount. A similar analysis of disregarded income, however, indicates that it too is not separable from the assistance grant. If a recipient had a standard

of need of $200 and income of $120, $60 of that income ($30 plus one-third of the remainder) would be disregarded, and the assistance payment would be $140 ($200 minus $60 "regarded" income). But if one-half of the disregard income "were not there," then income would be $90, disregard income would be $50, regard income would be $40, and the proper amount of the assistance payment would be $160. Neither regard nor disregard income can be reduced without a corresponding increase in the assistance payment: neither is "exclusive" of such payment.

The second fatal point is this: "currently available" income and resources are determined only <u>after</u> "all policies governing disregard of income have been uniformly applied." HEW, then, seems to treat disregard

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income as non-exclusive of the current assistance grant and as non-currently available income and resources. HEW would appear not to allow recoupments from disregard income in cases of agency error or non-wilful recipient error. This seems to be the position taken by HEW in arguing amicus curiae to the district court in Hagans v. Wyman, (E.D. N.Y., July 28, 1975, Docket No. 72 C 182)(received by the Court as Exhibit A attached to plaintiffs' letter of August 29, 1975). There Judge Mishler related HEW's position to be that involuntary recoupment is improper absent wilfulness on the part of the recipient.

There is a further good reason for rejecting reliance of DPW on regulations of HEW. 45 C.F.R. § 233.20(a)(3)(viii) states that a State plan must:

> "(viii) Provide that payment will be based on the determination of the amount of assistance needed . . . ."

It is impossible for DPW to argue that its plan is in full compliance with HEW regulations while at the same time arguing that its redetermination of the amount to be paid these plaintiffs was not based on a determination of need.

There is one final point which indicates a secondary reason for Congress making the disregard income provision mandatory upon the States in circumstances such as are presented here. Defendant asserts that the disregard income provided for in 42 U.S.C. § 602(a)(8) is income in "excess" of a State's standard of need. As a general statement about the impact and meaning of § 602(a)(8), this statement is untrue. Not all

States pay 100% of what is determined to be needed. States differ in their social policies and social philosophies; States differ in the impact upon their own treasuries of A.F.D.C. demands; States differ in the extent to which they have been confronted with the sorts of financial crises which gave rise to revenue sharing. Whatever the reason, a good many States do not pay 100% of need; and Congress has not required 100% payment. Dandridge v. Williams, supra. Section 602(a)(8) is mandatory and it applies uniformly. Two implications flow from these circumstances.

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First, any interpretation of the mandate of § 602(a)(8) is one which has general application to all States. The Court is interpreting a law which is equally mandatory or non-mandatory for all, and the Court should take cognizance of the broader ramifications of its interpretation. Accordingly, the Court is aware that if Minnesota is free to recoup from disregard income in these circumstances, so is a State paying less than need. In such a State, disregard income may be the only resource which allows an A.F.D.C. family to rise to the level of minimum subsistence, and recoupment from "excess" income might be recoupment from the mouths of hungry children. This Court is chary of inventing a principle which could be extended to allow such a recoupment.

The Court notes that this is not a form of recoupment which defendant Likins engages in and is not what defendant Likins proposes for Minnesota. DPW eschews implementation of the "Draconian" recoupments which HEW purports to authorize in cases of wilful recipient error and most certainly does not recoup below the State's standard of need here. However, DPW too must realize that Congress must of necessity legislate in generalities and that mandates of Congress are likewise of general application.

The second implication is related to congressional purpose. Income disregard was written into the Social Security laws along with the other so-called 1967 Amendments to the A.F.D.C. program. In Rosado v. Wyman, 397 U.S. 397 (1970), the Supreme Court had occasion to examine at length other aspects of the legislative history of those amendments. The Court noted that as of that time many States paid benefits below their standards of need, and noted further that such deficiencies were clearly brought to the attention of Congress in the course of the administration's attempt to secure legislation which would have required 100% payments. The Court noted at footnote 15, at pp. 410-411, the following testimony of Secretary Gardner before the Senate Committee on Finance:

> "As things stand today, the States are required to set assistance standards for needy persons in order to determine eligibility--but they need not make their assistance payments on the basis of these standards. The result is that welfare payments are much too low in a good many States. That is a widely accepted fact among all who are concerned with these programs; indeed it is probably the most widely agreed-upon fact among welfare experts today."

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In the Supreme Court's view, Congress was genuinely concerned about the problem of underpayment. Though Congress did not enact the administration's 100% payment proposal, it legislated, by "innuendo," in such a manner as to "nudge" the States in the "preferred direction" of bringing payments up to the standard of need:

> "While Congress rejected the mandatory adjustment provision in the administration bill, it embodied in legislation the cost-of-living exercise which has both practical and political consequences." Id., at 413.

Among those consequences were forcing the States to make more persons eligible for benefits in the light of economic realities and forcing the States to accept the political consequences of "bringing to true light" the deficiencies in payments as related to need.

In this Court's view the income disregard provisions enacted in the 1967 amendments also have obvious practical and political consequences in relation to this problem of underpayments. Congress may well have recognized that income disregards in many States were extremely important as a supplement to State underpayments and as a means of raising the welfare family to the level of mere poverty. See, fn.12, Rosado v. Wyman, supra. At the same time, Congress was serious about work incentives; there is no reason to doubt that such incentives were designed primarily as an adjunct to the WIN program. Since the incentives were near the heart of a new national initiative in A.F.D.C., it was perhaps political-

ly important to explain them solely in terms of that new direction and unnecessary to point out that in many circumstances such "extra" money was also needed to satisfy basic needs. When Congress enacted 42 U.S.C. § 602(a)(8) it had every reason to be aware that this enactment would fulfill basic needs in many States, and the mandatory thrust of the statute may have been at least partially the product of such an awareness. To find recoupment from disregard income permissible might frustrate congressional purpose not only regarding work incentives but regarding providing for the needs of dependent children as well.

Through her recoupments defendant Likins is attempting to remedy an inequity in the A.F.D.C. program. However, what defendant Likins views

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as an inequity, Congress view[illegible] what may seem to be an inequity in a State such as Minnesota [illegible] of need is not necessarily an inequity in a State paying less than 100% and which is subject to the same Federal requirements as is Minnesota.

IV. INDISPENSABLE PARTIES.

Defendants argue, finally, that the case should be dismissed for failure to join the Secretary of HEW, an allegedly indispensable party under Fed. R. Civ. P. 19. In light of the Court's conclusion that HEW regulations support plaintiffs' position in this Court, defendant's sole foundation for this claim, Almenares v. Wyman, 453 F.2d 1075 (2nd Cir. 1971), crumbles. In a suit in which plaintiffs attack State regulations as violative of a Federal statute, and do not urge the invalidity of the Federal regulation and seek no relief against the Secretary of HEW, the claim is without merit:

> "Where the suit involves an alleged conflict between the State regulation and the federal law, neither the United States nor HEW is a necessary party to such an action." Rosado v. Wyman, supra, at 428 (Douglas, J., concurring).

Defendant's claim, while non-meritorious as a Rule 19 matter, does bring an important point to the Court's attention: the opinion of HEW would be helpful in arriving at a proper disposition of the merits. The means to securing such an opinion is not through Rule 19, but rather by asking the Secretary for a brief amicus curiae and inviting intervention pursuant to Rule 24. In Rosado v. Wyman, id., the majority noted that district

courts "should" attempt to obtain the views of HEW in cases such as this by inviting an amicus brief or participation as a party, presumably under Rule 24. In a case similar to the one here, the Eighth Circuit Court of Appeals has likewise noted the propriety of a district court's seeking an administrative opinion or inviting administrative participation as a party in the action. See, Barrera v. Wheeler, supra, 441 F.2d at 801.

In light of this judicial comment, the Court is inviting the Secretary of HEW to submit an amicus brief, and is directing a copy of this opinion to the Secretary. Should the Secretary preliminarily request any additional materials on file here, this Court will order that they be sent

to him. If in the Secretary's opinion the issues are sufficiently doubtful or important as to warrant amicus participation, it is hoped the Secretary will participate. If he believes this is a case of considerable importance, it is suggested that he seek leave to intervene.[29] Should the Secretary indicate his desire to participate, the Court will by further Order direct the parties to submit to him copies of all matters which have been filed in this Court and copies of all briefs, etc., which have been submitted herein.

The Court sees no compelling reason to delay issuance of a preliminary injunction pending the Secretary's decision whether to participate. It seeks his participation because the issues are substantially difficult and the Secretary's opinion would facilitate this Court's making its determination of the merits upon the hearing for a permanent injunction. Though the Court has interpreted the Secretary's recoupment regulation as denying the type of recoupment attempted here, that regulation does not speak specifically to the question of recoupment from disregard income and the Court is not aware of any specific statement by the Secretary directed to this issue.[30] Cf., Rosado v. Wyman, supra.

V. CONCLUSION.

For the reasons stated above this matter should not now proceed as a class action. Abstention is inappropriate in this context of predominantly Federal statutory questions. A preliminary injunction is warranted.

ORDER

IT IS ORDERED:

1. That this action not be certified as a class action at this time.

2. That the defendants herein, their successors in office, agents and employees are enjoined from recouping prior overpayments which were caused solely by agency error from one-half of the "disregard" income of A.F.D.C. recipients, as such income is defined in 42 U.S.C. § 602(a)(S) and Minnesota Statutes § 256.74 Subdivision 1.

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3. That the defendants herein, their successors in office, agents and employees are enjoined from enforcing or applying the provisions of Department of Public Welfare Program Manual VI-C-2, July 31, 1975, insofar as such Manual purports to authorize recoupment in cases of agency error, but only insofar as such Manual purports to authorize recoupment in cases of agency error, and are further enjoined from enforcing any modification of such Manual which would purport to authorize recoupment from disregard income in cases of agency error, and are further enjoined from enforcing any other agency policy of any kind whatsoever which would purport to authorize recoupment from disregard income in cases of agency error.

4. That the defendants herein, their successors in office, agents and employees shall provide all persons otherwise eligible for A.F.D.C. benefits and who earn disregard income and who have received A.F.D.C. overpayments caused by agency error, with the full amount of the benefits to which such A.F.D.C. recipients are entitled irrespective of the existence of the prior overpayments; and for such recipients such disregard income shall be fully and uniformly disregarded in all cases.

5. That the defendant Likins or any other official of the Minnesota Department of Public Welfare shall send a copy of this Court's Order to the county welfare departments of the several counties of the State of Minnesota no later than five days after being served with a copy of this Order and shall include with said copy a directive requiring immediate compliance with Paragraphs (2) through (4) of this Order.

6. That defendant Likins or any other official of the Minnesota Department of Public Welfare shall no later than fourteen days after being served with a copy of this Order file with the Court and serve on counsel for the plaintiffs a copy of the directive referred to in Paragraph (5) and an affidavit reflecting compliance with the provisions of that paragraph.

7. That no bond shall be required.

8. That a copy of this Order may be served on the defendants and their agents and employees by the United States Marshal or any other person

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of suitable age and discretion.

9. That a copy of this Memorandum and Order shall be mailed to the Secretary of the Department of Health, Education and Welfare, Washington, D.C., by the Clerk of this Court forthwith.

/s/ Earl R. Larson
United States District Judge

October 10, 1975.

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FOOTNOTES

1. A.F.D.C., Aid to Families with Dependent Children, is a program under which the States and the Federal government cooperate in providing aid to certain needy families. A.F.D.C. is provided for in Title IV of the Social Security Act, §§ 401, et seq., 42 U.S.C. § 601, et seq. In this Memorandum bare section references to Federal law (e.g. § 600) are references to the location of the applicable law in the United States Code, Title 42.

Recoupment procedures as to plaintiff Allan were commenced in February 1975 to recoup $162. Plaintiff Allan appealed this decision to the Hennepin County Hearing Officer, who affirmed the agency action. This affirmance was appealed to the State agency, which affirmed the recoupment. Plaintiff Allan has had A.F.D.C. checks for the months of May, June and July 1975 reduced to effectuate a recoupment. These recoupments seem to be larger than the overpayment. The reason for this discrepancy is not clear and it is not certain whether all of plaintiff Allan's overpayments have been recouped, whether she continues to be subject to recoupment, or whether she has appealed the State agency's decision to the State District Court. Minnesota Statutes § 256.77.

Plaintiff Johnson is currently having $90 per month withheld from her A.F.D.C. grant as recoupment of $495 overpayment. Notification of proposed recoupment was given plaintiff on March 7, 1975. Plaintiff appealed the recoupment decision to the Hennepin County Hearing Officer. The county agency was affirmed and recoupment was instituted as of July 1, 1975. Plaintiff Johnson's case was appealed to the State agency. At the time of the filing of plaintiffs' motion, the State agency had not ruled on the appeal. The Court has not been advised whether the State agency has acted on this appeal.

At the time of the filing of the complaint plaintiff Morrison had been informed of the county agency's determination to recoup $1,278 in overpayments. Plaintiff had appealed this decision to the county hearing officer. No actual recoupment occurs during the pendency of this first level of appeal. By the time of the hearing on plaintiffs' motion for a preliminary injunction the county agency had been reversed by the hearing officer, who found that the DPW A.F.D.C. Program Manual VI-C-2 dated July 3, 1975, did not authorize recoupment from A.F.D.C. payments in cases of agency-caused error. On August 14, 1975, the county agency again informed plaintiff of its intent to begin recoupment, pursuant to a change in the DPW A.F.D.C. Program Manual dated July 31, 1975. Plaintiff Morrison has appealed this new recoupment decision to the county hearing officer, and apparently during the pendency of this first level appeal recoupment has not yet actually begun as to plaintiff Morrison.

2. It is not clear whether plaintiff Allan remains subject to any recoupment. If she is presently being recouped, it is pursuant to the July 31 Manual revision. The threatened recoupment of plaintiff Morrison is expressly based in toto on this provision. Recoupment of plaintiff Johnson began before the July 31, 1975, revision was announced. The County Hearing Officer's decision in plaintiff Morrison's first appeal casts doubt on the propriety of the initial recoupments from plaintiff Johnson. That issue, however, is not before this Court, for plaintiffs concede that the Court is essentially powerless to grant retrospective relief as to any recoupments which have actually been effectuated. See Edelman v. Jordan, 415 U.S. 615 (1974). It is the actually continuing and presently threatened recoupments with which the Court is concerned, and these are clearly being pursued under authority of the revised program manual, which provides as follows:

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Overpayments

Overpayments may be resolved through

The recipient's voluntary reimbursement of the overpayment.

Recoupment of an amount up to one-half the current monthly earnings disregard. This is accomplished by reducing the AFDC grant in the amount of the recoupment.

* * *

Recoupment should be made in all cases in which an AFDC recipient receives an overpayment and has disregarded income. This includes overpayments due to agency error as well as recipient error.

3. "Disregard income" derives from the requirements of § 402(a)(8) of the Social Security Act, 42 U.S.C. § 602(a)(8), and from 45 C.F.R. § 233.20(a)(6), (7), and (11), and Minn. Stats. § 256.74 Subdivision 1. In determining need and the amount of the assistance payment, the State agency must disregard the first $30 of recipient earned income and one-third of additional income. It is only the remainder of the recipient's income, the non-disregarded income, which is then considered by the State agency in reducing dollar for dollar the payment of A.F.D.C. benefits. The "disregard" of income thus provides a financial work incentive for A.F.D.C. recipients, increasing the total monthly income of a family unit with working members by slightly more than $1 for every $3 of earned income. Absent the disregard, there would be no financial incentive for the A.F.D.C. recipient to work. (For analysis of legislative history of income disregards, see Mr. X v. McCorkle, 333 F. Supp. 1117 (D. N.J. 1970), affirmed in relevant part, sub nom Engleman v. Amos, 404 U.S. 23 (1971), and discussed, infra, Part III, B.)

4. HEW regulations reveal a continuing concern with quality control of agency action, and the standards for internal agency control become increasingly stringent over time. 45 C.F.R. § 205.40. These standards are backed up by financial sanctions against States which fail adequately to control erroneous payments. 45 C.F.R. § 205.41. Given this emphasis, it is not clear that the percentage of total error attributable to agency error will be constant over a period of time. Further, given the likelihood that State quality control efforts will be instituted at different rates for different programs, the percentage of overpayments attributable to agency error may not be constant from program to program.

Other statistical averages employed by plaintiffs assume that what is true on the average throughout the A.F.D.C. program is also true for the persons plaintiffs attempt to identify as a class. The Court is not certain that this fundamental assumption is valid.

5. The Court has been given no evidence regarding the present state of the State's recoupment efforts. If this is a long-standing program, statistics may be available revealing how many persons repay voluntarily. If this is a new program, any estimate of voluntary repayments is totally speculative.

6. Each named plaintiff is being subjected to involuntary recoupment and plaintiffs' attack is directed solely at such involuntary recoupments.

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7. Plaintiffs' estimate of 793 class members involves the multiplication of three successive percentage figures, none of which percentages is necessarily valid. With such multiple calculations based at each step on potentially invalid assumptions, the margin of possible error in the calculation may be quite large. Plaintiffs have not attempted to estimate the number of recipients who when told they had received more than they were entitled to by law agreed voluntarily to a repayment plan.

8. While the claim of plaintiff Allan may have been mooted before this case was filed (if recoupment as to plaintiff Allan is complete), there is no indication that plaintiff Johnson's claim will be soon mooted. Although plaintiff Morrison was successful in her first appeal to the County Hearing Officer, the change in the DPW A.F.D.C. Program Manual may mandate a contrary result in her present appeal. The Court does not perceive that plaintiff Morrison's present administrative appeal will moot her very substantial claim. Rather, it appears that defendant's policy is to recoup pursuant to the revised Program Manual and that absent a preliminary injunction plaintiffs Morrison and Johnson will be subject to many months of future recoupments.

9. Steere v. State of Minnesota, No. 706921 (Hennepin County District Court, November 29, 1974), appeal docketed, 45615, Minnesota Supreme Court; Eichenberger v. State of Minnesota, No. 707355 (Hennepin County District Court, December 12, 1974), appeal docketed. No. 45777 Minnesota Supreme Court; Duncan v. State of Minnesota, No. 705572 (Hennepin County District Court, January 13, 1975), appeal docketed, No. 45778, Minnesota Supreme Court.

10. The briefs of the parties in Steere were provided by defendant as Exhibits "A," "B," and "C" of her Memorandum in Opposition to Plaintiffs' Motion. Exhibit A contains an Appendix in which can be found Judge Amdahl's decision in Steere, along with substantial portions of the administrative record. References to the Steere briefs will be to "Defendant's Exhibits A, B, or C," and materials found in the appendix to Exhibit A will be referred to as "Defendant's Exhibit A, App. at A- . . ."

11. A fourth issue is also argued there: whether, even if the recoupment is valid and the income tax refund treatment is proper, the correct amount was recouped. That issue, not even reachable if any of the first three issues were resolved in favor of the State plaintiffs, cannot have any bearing on the case here.

12. For discussion of the Federal statute, see Part III, B., infra. The Minnesota Statute, M.S. § 256.74 Subdivision 1(2), provides in relevant part as follows:

> "The amount of assistance which shall be granted . . . shall be determined by the county agency with due regard to the resources and necessary expenditures of the family . . . and shall be sufficient, when added to all other income and support available to the child, to provide such child with a reasonable subsistence compatible with decency and health. In making its determination the county agency shall exclude the following from family income:
>
> * * *
>
> (2) The first $30 plus one-third of the remainder of the combined monthly earnings of any dependent child not included under clause (1), and any adult who is a recipient of aid for families with dependent children."

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13. The Court wishes to emphasize that such an analysis as this is undertaken only becaused detailed factual analysis seems to be mandated by the abstention doctrine. Conjecture concerning the possible course State courts will take with Federal and State issues is essential to resolution of the abstention issue.

14. It is disturbing to note apparent factual contradictions between Commissioner Likins' representations to the Minnesota Supreme Court (statewide policy of no recoupment in cases of agency error, filed April 2, 1975) and the experiences of plaintiffs Allan (State agency in May 1975 affirms recoupment as of March 1, 1975, to be proper in a case of agency-only error) and Johnson (county agency institutes recoupment procedures on March 7, 1975, in a case of agency-only error).

15. Freda is clearly distinguishable in that it involves a matter of peculiarly local concern (domestic relations) which was inextricably bound up with the Federal claim. See discussion in Part II, C, infra. Freda appears to fit within the narrowly limited range of extraordinary circumstances justifying non-constitutional abstention.

16. Such an opinion could not be rationally defended in any event, as a reading of Meagher and Blue Earth, supra, discloses.

17. 45 C.F.R. § 233.20(a)(12).

18. The absence of an "allegation" of fraud in Minnesota is not particularly probative of the non-existence of fraud or wilfulness. DPW believes it recoups in all cases as if there had been no wilfulness. A finding or an allegation of fraud has no bearing on the type of recoupment DPW believes it has implemented, and it is administratively unnecessary for DPW to allege fraud in any recoupment case.

19. At the time of Steere the regulation provided as follows:

"(a) A State Plan . . . must . . .

* * *

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs; (b) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their needs as determined by the statewide standard; (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; and (d) income and resources will be reasonably evaluated." 45 C.F.R. § 233.20(a)(3)(ii). (As of October 1, 1974.)

This regulation mandates application of disregard income policies only in clause (a), and the application of such policies in clauses (b) - (d) is ambiguous. This ambiguity is of particular importance in clause (c) which addresses itself to "actually available" and "currently available" income and resources. The revised "income

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Footnote 19, Cont.

"and resources" regulation makes clear that disregard income policies must be applied generally and uniformly. Now, a State Plan must:

> "(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:"
>
> [Five clauses, (a) - (e) follow, and concern such matters as determining need, financial eligibility, and the amount of the assistance payment; and currently available income and resources.] 45 C.F.R. § 233.20(a)(3)(ii). Federal Register, Vol. 40, No. 54, March 19, 1975.

The new regulation became effective in June 1975.

20. This case will have a class action effect, even though it is not decided as a class action. The disruption argument of defendant is premised on the belief that the class action effect will be so broad as to sweep within this decision the State court litigants.

21. The fact that an opinion is expressed on the probable merits of questions now pending in State court is in no real sense an interference with State court proceedings. Defendant's interference argument must be addressed to the practical coercive impact of an injunction.

22. In some States disregard income may not raise a recipient's family above the level of minimum need. See, Part III, B, infra.

23. The characterization of disregard income as "excess" income is defendant's characterization.

24. Defendant provided a detailed schedule reflecting the potential value of these services to the A.F.D.C. recipient. The final column summed up the total resources available; this sum included the grant and total net income. Most of the back-up services are not special programs.

25. Plaintiffs' affidavits state a firm intention to continue to work indefinitely. There will thus continue to be a source of "disregard" income from which future recoupments may be obtained.

Those receiving disregard income are those who have demonstrated the ability and initiative to obtain employment while raising a family. Congressional policy is aimed at encouraging such persons to become completely self-supporting. 42 U.S.C. § 601. Plaintiffs here may be those very persons whose need for A.F.D.C. benefits will not be prolonged, and who in the near future may have succeeded in achieving financial independence. At such time DPW may be able to pursue a variety of avenues for obtaining repayments.

26. HEW believes this recoupment is authorized, so long as there is a case-by-case treatment of the matter to insure that no "undue hardship" results from the recoupment. 45 C.F.R. § 233.20(a)(12)(i)(f).

27. Aside from McCorkle, the legislative history argued by the parties here is of doubtful help. Inferences drawn from congressional action in 1935 and 1939 hardly reveal anything regarding congressional purposes regarding recoupment in the 1968 WIN Program.

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Footnote 27, Cont.

Congressional failure to require recoupment in all cases from grant payments in the 1970s likewise casts little light on what Congress would permit in relation to disregard income recoupments.

28. Defendant's recoupment does not fall within either of the exceptions mentioned.

29. A preliminary injunction has issued. No immediate interests would be prejudiced by any slight delay which might attend intervention. The Court cannot conceive of any reason that would require denial of a motion to intervene.

30. Judge Mishler's recent opinion in Hagans v. Wyman, supra, strongly suggests what HEW's position on recoupment will be. However, his recounting of the HEW brief is a second-hand source of HEW opinion, and the issue in Hagans focused on voluntariness, not on disregard income.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

OFFICE OF THE ADMINISTRATOR

JUL 10 1974

Dear Sir:

On April 11, 1974, the United States District Court for the District of Columbia issued a final order in the case of the National Welfare Rights Organization v. Weinberger, Civil Action No. 1703-73. This order held invalid the existing recoupment regulation appearing at 45 CFR §233.20(a)(12)(i). It stated that recoupment from current public assistance grants of prior overpayments when the recipient lacks income or resources available in the amount of the proposed reduction was prohibited by certain specified sections of the Social Security Act. Nevertheless, the Court specifically stated that nothing contained in the order should "be construed to prohibit by regulation the recoupment from current assistance grants of prior overpayments where said overpayments were occasioned or caused by a recipient's willful withholding of information concerning his income and resources."

The order requires the Secretary of Health, Education, and Welfare to rescind the existing regulation appearing at 45 CFR §233.20(a)(12)(i) and notify each State welfare agency of such rescission.

Accordingly, to the extent that your State plan in effect pursuant to §401 et seq. of the Social Security Act [1] permits recoupment of overpayments in situations other than those permitted by the revised recoupment regulation, published in the Federal Register on June 21 at 39 Fed. Reg. 22263 (a copy of which is enclosed for your convenience), please submit a formal amendment to your State plan not later than July 26, 1974, to conform any recoupment provision contained therein to the provisions of the revised §233.20(a)(12)(i).

In this regard, please note that subsection (a)(1) of the revised regulation is to be interpreted as though the words, "exclusive of the current assistance payment" had been omitted. Thus, this provision does

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[1] For Guam, Puerto Rico, and the Virgin Islands, add: §§ 1 et seq., 1001 et seq., 1401 et seq. and 1601 et seq. of the Social Security Act.

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not authorize recoupment from net non-exempt income which has been considered in determining the welfare payment.

Moreover, with respect to section (c)(4) of the revised regulation, if you require a recipient to notify your agency prior to negotiation of an increased check, as permitted therein, your agency will be required to insure that a recipient is able to contact the agency immediately to report a possible overpayment.

Finally, the state agency's duty to respond within 24 hours, which is required under subsection (c)(4), will require the agency either to issue a replacement check within such period or to take other measures which would assure that the recipient has access, within that period, to at least the amount of funds which had been received during the previous month. Examples of such "other measures" include an immediate notification to the recipient either that he is entitled to the amount of the increment or that he can negotiate the check received and spend from its proceeds the amount of the assistance payment which he received the previous month. Within a reasonable period thereafter, your agency must then ascertain the amount of further payment, if any, to which the recipient is entitled, promptly notify the recipient of such determination, and pay such amount to him.

If you believe that no change is necessary in your State plan as a result of the replacement of the rescinded recoupment regulation, please notify me by letter not later than July 26, 1974, indicating in detail the reasons why you believe no such change is necessary. In this connection, please note that the District Court's order requires the Secretary of Health, Education, and Welfare to advise the States that they will be subject "to the compliance procedures set forth in the Social Security Act and defendant's regulations thereunder" should State compliance with the revised recoupment regulation not have been established. In addition, the Secretary is required to serve upon counsel for the plaintiff within 120 days from the date of the order a report on the status of the provision of each State plan in effect with respect to recoupment of benefits to recover prior overpayments. Needless to say, we hope that we can report that your State is in compliance with the revised regulation.

Yours very truly,

[signature]

James S. Dwight, Jr.
Administrator

Enclosure

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

IN THE MATTER OF THE
CONNECTICUT CONFORMITY HEARING

TO ALL PARTIES

Attached is a copy of my final decision dated May 28, 1971. In accordance with 45 C.F.R. 213.32(a) I am serving it on all parties and amici on this date.

John D. Twinam
Administrator

Washington, D. C.
May 28, 1971

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U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social and Rehabilitation Service

IN THE MATTER OF THE CONTINUANCE OF GRANTS TO THE STATE OF CONNECTICUT UNDER TITLES I, IV, X, XIV, AND XIX OF THE SOCIAL SECURITY ACT	DECISION OF THE ADMINISTRATOR

This matter raises the question of whether the State of Connecticut's plans for Old Age Assistance (OAA), Aid to Families with Dependent Children (AFDC), Aid to the Blind (AB), Aid to the Permanently and Totally Disabled (APTD), and Medical Assistance (MA), continue to comply with the requirements set forth in pertinent sections of the Social Security Act and whether Connecticut is entitled to continue to receive Federal funds for the operation of the aforementioned programs. The Connecticut State Welfare Department is the State agency charged under Connecticut law with the administration of the aforementioned programs. The Secretary of Health, Education, and Welfare has delegated to me the authority and responsibility for the administration of the public assistance titles of the Social Security Act.1/

Pursuant to this authority, my predecessor Miss Mary E. Switzer notified the State Welfare Department on November 14, 1969, that serious questions existed as to whether the State plans involved continued to comply with certain requirements of Federal law and regulations. At that time, Miss Switzer offered the State an opportunity for a hearing, as provided in Sections 4, 404(a), 1004, 1404, and 1904 of the Act, and 45 CFR 201.6 on the question of whether the State could continue to receive Federal financial assistance for the operation of its public assistance program under the titles of the Act involved.

The notice specified seven issues to be considered at the hearing. Subsequently, Mr. Edward K. Adelsheim was designated to preside over the hearing. On December 19, 1969, Miss Switzer modified the hearing notice by adding three additional issues. The hearing was convened on

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1/ This delegation of authority by the Secretary of HEW to the Administrator of the Social and Rehabilitation Service is set forth in the Federal Register of January 25, 1969. 34 F.R. 1279-1288, amended in 34 F.R. 18561 (November 21, 1969). The authority for this delegation is provided in Section 6 of Reorganization Plan No. 1 of 1953, 67 Stat. 631, 5 U.S.C. Appendix.

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January 20, 1970, and on January 21 was adjourned until further notice. The hearing was not resumed pending a decision in Federal Court concerning participation of third parties, and pending expiration of the time period allowed for appeal of that decision.

I notified the State Welfare Department on October 5, 1970, that serious questions continued to exist as to whether the State plans involved continued to comply with certain requirements of Federal law and regulation.2/

At that time I offered the State an opportunity to continue the hearing adjourned on January 21, 1970, as provided in Sections 4, 404(a), 1004, 1404, and 1904 of the Act, and 45 CFR 201.6 on the question of whether the State could continue to receive Federal financial assistance for the operation of its public assistance program under the titles of the Act involved.

This notice specified thirteen issues (some identical to the previous notice and some modified) to be considered at the hearing. By order of the same date, I designated Mr. Edward K. Adelsheim to preside over the hearing and to certify and transmit to me the entire record of the proceeding, including his recommended findings and proposed decision.

On November 10 I notified the State Welfare Department that several of the issues raised in the October 5 notice were revised.3/

The actual hearing was held on December 1, 2, and 3, 1970 in Boston, Massachusetts. In addition to SRS and the State agency, several organizations participated as parties at the hearing.4/ I have now reviewed the official transcript of the proceedings, the exhibits received in evidence, the briefs of the parties, the Hearing Examiner's recommended findings and proposed decision, and the comments thereon of the parties. After consultation with the Secretary regarding this matter, I am now prepared to issue my final decision.

2/ As required by 45 CFR 213.14(a), this notice was published in the Federal Register of October 7, 1970. 35 F.R. 15773-15774.

3/ As required by 45 CFR 213.14(a), this notice was published in the Federal Register of November 10, 1970. 35 F.R. 17276-17277.

4/ The Hearing Examiner admitted the following additional parties to the hearing: the Connecticut Hospital Association, the National Welfare Rights Organization and its Connecticut affiliates, Welfare Recipients are People, the New Haven Moms, the Quinnipiac Welfare Rights Mothers, and the Willimantic Welfare Rights Organization.

Before discussing the substantive issues raised by the hearing notice, I feel it necessary to clarify what issues, of those raised by the original hearing notice, remain before me for consideration. By letter dated November 25, 1970, to all parties, I formally removed issues 1(a), 3, and 6 from the hearing process, having determined, after receipt of plan material from the State of Connecticut and a review of the comments of the parties on that material, that these compliance issues had been satisfactorily resolved. Similarly, in a letter dated May 24, 1970, I removed from consideration in the hearing process issues 5, 7, 8, and 13. Accordingly, of those issues raised by the original hearing notice, the issues that remain to be resolved are: Issues 1(b), 2, 4, 9, 10(a), 10(b), 11, and 12.

Issue No. 1(b)

Disregard of Earned Income - AFDC

This issue concerns whether the Connecticut plan for AFDC complies with the requirement, set forth in Section 402(a)(8)(A)(ii) of the Social Security Act, as interpreted in 45 CFR 233.20(a)(11)(ii)(b), that, in computing assistance payments for certain AFDC recipients, the State disregard certain amounts of "earned income". The precise provision of Connecticut law called into question here is Section 17-2 of the General Statutes of Connecticut, which was enacted by Section 9 of Public Act No. 730 of 1969. While this statute purports to comply with the earned income disregard requirements of the Social Security Act, it provides that the income disregard policy will not apply where the earned income of a recipient or applicant, after certain deductions (See Issue No. 4), is in excess of $266.67 for a family of two, plus an additional $50 for each additional dependent. The effect of this statute is to create a class of cases as to which the earned income disregard policy will not be applied, thereby placing a ceiling on the amount of income that may be so disregarded. Connecticut has implemented this ceiling in the Connecticut Welfare Manual, Volume I, Chapter III, Sections 330, 332.3 332.33, and 332.34.

The income disregard provision in question, Section 402(a)(8), was added to the Social Security Act by the 1967 Social Security Act amendments. As enacted, the income disregard provision was permissive until June 30, 1969, but made mandatory on all States participating in the AFDC program as of July 1, 1969. The only limitation upon application of the disregard provision which Congress intended, is contained in Section 402 (a)(8)(D), which provides that if a particular family's earned income in a particular month (before application of the disregard) is in excess of what the State has determined to be their need, and the family did not receive AFDC assistance in any one of the four preceding months, then the earned income disregard cannot be applied to render that particular

family eligible. However, as I have indicated, this is the only limitation on application of the earned income disregard that the Congress enacted into law. The effect of the Connecticut statute is to add another limitation, and thereby to create a class of recipients to whom the earned income disregard will not be applied - a class not contemplated by the Social Security Act. The necessary effect of the Connecticut provision, as evidence received at the hearing amply demonstrated, is to result in a substantial reduction of benefits to many recipients and to render totally ineligible for AFDC many others who would be eligible if the proper income disregard method were applied.

Connecticut does not dispute this position. Rather, in briefs filed in connection with the hearing, Connecticut argues that, under the case of Dandridge v. Williams, 397 U.S. 471 (1970), States participating in the AFDC program are left with discretion to allocate available resources among recipients. Connecticut argues that the Federal regulation in question operates to deny that discretion to the States. This position, in my opinion, is not well taken. The Dandridge case simply held that, under the AFDC program, the States were left with the discretion to allocate their available resources among recipients by the imposition of maximum limitations on AFDC assistance payments. The decision in that case rested on the realization that the Social Security Act and the AFDC program have left the states with considerable latitude in determining standards of need and in establishing levels of payment. Thus, in an area to which the statute has not specifically spoken, the operation of the AFDC program is left to the discretion of the States. However, in enacting Section 402(a)(8), Congress unequivocally spoke to the issue of earned income disregards, and participating States are left with no discretion but to comply with these Federal conditions.

As I have indicated, the provisions of Connecticut law in question impose a limitation on the application of the earned income disregard of Section 402(a)(8) which is not permitted by the Social Security Act, and operate as a disincentive to employment in certain cases. Accordingly, I am compelled to conclude that the Connecticut plan for AFDC fails to conform to the requirements of Section 402(a)(8) of the Social Security Act and 45 CFR 233.20. It is my understanding that Connecticut is in the process of eliminating this compliance problem by means of appropriate remedial legislation.

Issue No. 2

Disregard of Earned Income - OAA, AFDC, AB, APTD

This issue concerns whether the method employed by Connecticut for disregarding earned income in its plans for OAA, AFDC, AB, and APTD complies with the requirements of Sections 2(a)(10)(A), 402(a)(8)(A)(ii), 1002(a)(8), and 1402(a)(8) of the Social Security Act, as these provisions have

been interpreted in 45 CFR 233.20(a)(7)(i). There is no dispute of fact raised in connection with this issue, and it requires no extended discussion. The regulation in question, 45 CFR 233.20(a)(7)(i), requires that the proper method is to apply the earnings exemption to an individual's gross income, before work-related expenses are deducted. At the hearing, Connecticut stipulated that the method for disregarding earned income employed in all its categorical assistance programs was to deduct expenses of employment from gross earnings and then to apply the earned income disregard to net earnings. (See Volume I, Chapter III, Section 332.34 of the Connecticut Welfare Manual.)

This is the precise issue raised with respect to the compliance with Federal law and regulations of the State of Arizona's plan for AFDC. As did Arizona, Connecticut does not maintain that it complies with Federal law, but instead chooses to challenge the validity of the regulation in question. For the reasons stated in my decision in the Arizona conformity hearing, issued on January 26 of this year, I conclude that the regulation in question is valid, and that the Connecticut plans fail to comply with the requirements of Federal law in this regard.

Issue No. 4

Work-related Expenses - OAA, AFDC, AB, APTD

Since the enactment of the Public Welfare Amendments of 1962, P.L. 87-543, all the titles of the Social Security Act have required State plans thereunder to provide that, in determining the need of an applicant for assistance, the State shall take into consideration any income and resources of such individuals "as well as any expenses reasonably attributable to the earning of any such income." (See Sections 2(a)(10)(A), 402(a)(7), 1002(a)(8), and 1402(a)(8) of the Social Security Act.) This issue raises the question of whether Connecticut's public assistance programs comply with this requirement, as it has been interpreted in 45 CFR 233.20(a)(3)(iv)(a). Connecticut stipulated at the hearing that, pursuant to the requirements of Section 17-2 of the General Statutes of Connecticut, the Connecticut Welfare Manual, Volume I, Chapter 3, Section 332.32, provides that only certain payroll deductions, such as withholding tax, Social Security tax, mandatory retirement plans, union dues, and Blue Cross, etc., are considered and deducted as work-related expenses. Thus, in computing need for assistance, Connecticut fails to take into consideration expenses which are not deducted from an individual's paycheck - expenses of a more personal nature, but which nevertheless are "reasonably attributable" to the earning of income within the meaning of the statute. 45 CFR 233.20(a)(6)(iv), while not providing an exhaustive or final list of these typed of work expenses, does contain some examples of expenses which the State should take into consideration, e.g., transportation money, lunch money, etc. It is apparent from the legislative history of the

1962 Social Security Act amendments (See House Report No. 1414, 87th Cong., 2nd Sess. (1962)23) that the intent of Congress in enacting these statutory provisions was to provide an incentive for welfare recipients to accept and maintain themselves in gainful employment. In order for this incentive to operate effectively, the welfare recipient, once employed, should receive more money than when he remained unemployed. The only limitation placed by Congress on this requirement that the States take into consideration work-related expenses was that such expenses be "reasonably attributable to the earning of income." While it is possible that, in some cases, there may be disputes as to what expenses are included in this standard and which expenses fall outside it, no such issue is involved in this case. For, it is clear that Connecticut has enacted an altogether too narrow view of the types of expenses that are reasonably attributable to the earning of income and has not complied with a Federal regulation which represents a perfectly reasonable interpretation of the requirements of the Social Security Act.

In its brief, the State of Connecticut took the position that the earned income disregard provisions of the relevant titles of the Social Security Act (See Issue No. 2) are intended to cover such work-related expenses of a personal nature and that no further consideration need be given them. However, Connecticut was unable to point to anything in the Social Security Act or in its legislative history that supported this contention. I am, therefore, compelled to reject this assertion and to conclude that, in this regard, Connecticut has failed to comply with the requirements of Federal law.

Issue No. 9

Simplified Methods for Determination of Eligibility - AFDC, MA

This issue concerns whether certain provisions in Connecticut's plans for AFDC and MA, regarding the testing of a simplified method of determining eligibility in the AFDC program and in that part of the MA program dealing with families with children, have been implemented in compliance with the requirements of 45 CFR 205.20(a)(1). Both Title IV and Title XIX of the Social Security Act require that State plans thereunder must "provide such methods of administration as are found by the Secretary to be necessary for the proper and efficient operation of the plan." (See Sections 402(a)(5)(A), and 1902(a)(4)(A) of the Social Security Act.) Pursuant to the authority implied by these sections, and the authority of Section 1102 of the Social Security Act, the Secretary issued 45 CFR 205.20(a)(1) which required, for all assistance programs, that the testing of simplified methods for determining eligibility was to be undertaken by July 1, 1969. In response to this requirement, Connecticut indicated that it would implement the simplified method in the MA program on June 1, 1970, and in the AFDC program on July 1, 1970. The precise issue raised by the hearing notice was whether Connecticut has complied with its own promise.

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As is apparent, this particular conformity issue does not raise the question of whether the provisions of a State plan conform with the requirements of the Social Security Act, but whether, in the operation of its plan provisions, the State is substantially complying with the requirements of the Act. While such a "practice issue" would ordinarily raise issues of fact to be resolved, this is not the case with this particular issue. This is so because, in stipulations filed in connection with the hearing, the Connecticut Social Welfare Department conceded that the testing of the simplified method had not been initiated in the AFDC program or in the MA program with respect to those families related to the AFDC category. Moreover, the State reiterated this concession at the hearing itself. I am forced to conclude as did the Hearing Examiner, that the State of Connecticut has in this regard failed to substantially comply with the requirements of the Social Security Act. However, Connecticut has now indicated that it has in fact implemented the testing program for the two programs affected, and I have announced my intention to remove this issue from the hearing.

Issue No. 10(a)

Confidentiality of Records - OAA, AFDC, AB, APTD, MA

This issue raises the question of whether the State of Connecticut's plans for the aforementioned programs comply with the dual requirement that they be administered by a single State agency (See Sections 2(a)(3), 402(a)(3), 1002(a)(3), 1402(a)(3), and 1902(a)(5) of the Act.) and that they provide safeguards restricting the use or disclosure of information furnished by applicants and recipients of assistance to purposes directly connected with the particular program. (See Sections 2(a)(7), 402(a)(9), 1002(a)(9), 1402(a)(9), and 1902(a)(7) of the Act.) Again, the facts are not in serious dispute. Section 17-83(b) of the General Statutes of Connecticut provides that information furnished by recipients in connection with public assistance programs shall be kept confidential, with the exception that authorized representatives of the Connecticut Department of Finance and Control may gain access to the records of any case where there has been an overpayment or assistance was improperly obtained, where there is a need to locate an absent parent, or to enforce a support obligation, and in certain other situations. This provision of Connecticut statutory law is reflected in the Connecticut Manual for Public Assistance Programs, Volume I, Chapter 3, Section 387. The provisions of the Social Security Act referred to above indicate that information furnished by recipients may be disclosed and used only for purposes "directly connected with the administration of the program." There seems to be no dispute that the purposes set forth in the Connecticut statute, pursuant to which the Department of Finance and Control may gain access to welfare records, are ones which can be considered to be directly connected with the administration of the public assistance program. However, it is also

clear that, under Connecticut law, the Department of Finance and Control, in serving these purposes, is permitted access to the entire record of a particular welfare recipient. Connecticut argues that, because the Department of Finance and Control, to whom such use and disclosure is granted, performs functions directly connected with the administration of the public assistance programs, Connecticut has complied with the requirements of Federal law.

While it may be conceded that the functions of the Department of Finance and Control are directly connected with the public assistance programs, the requirements of Federal law entail greater safeguards than this. The disclosure and the use of information furnished to the single State agency by welfare recipients is permissible under Federal law only for a purpose directly connected with the administration of the state program, and only such information from a particular case record as is pertinent to a particular purpose may be so disclosed. In other words, Federal law, as it has been interpreted consistently over the past 20 years, actually requires two safeguards on the use and disclosure of such information. Such disclosure must be: (1) granted only to persons performing a function directly connected with the public assistance program, and (2) such access must be to only those portions of a particular case record which are pertinent to the performance of that function. These requirements necessarily imply that some department or agency must have the responsibility for making a final determination as to what part of a particular case record is pertinent to a particular "directly connected" purpose. Under Federal law, this must be the single State agency charged with the administration of, and possessed of final administrative responsibility for, the operations of the public assistance programs. Because Connecticut law requires the Social Welfare Department to grant access to a recipient's entire case record to the Department of Finance and Control, it therefore deprives the State agency of final administrative responsibility for determining what portions of case records are to be so disclosed. Therefore, I must conclude that the State plans involved fail to conform both with the requirement that they be administered by a single State agency, and with the requirement that they provide adequate safeguards to restrict the use and disclosure of information furnished in connection with those programs. It is my understanding that Connecticut is in the process of correcting this deficiency by appropriate remedial legislation.

Issue No. 10(b)

The Role of the Department of Finance and Control in Establishing Paternity and Securing Support - AFDC

The question of the conformity of Connecticut's AFDC plan raised here is perhaps best elucidated by reviewing the statutory provisions involved. Section 402(a)(21) of the Social Security Act, as interpreted in 45 CFR 220.48, provides that the State agency, after all other avenues are exhausted for establishing paternity and for locating absent parents, is

to report such fact to the Secretary of HEW and to furnish the Secretary with the names and social security account numbers of the individuals involved. Section 410(a) of the Social Security Act contemplates that the Secretary of HEW shall then furnish to the Secretary of the Treasury, or his delegate, the names and social security account numbers so furnished to the Secretary of HEW. The Secretary of the Treasury is to provide the State agency involved, from the master files of the Internal Revenue Service, the address of the particular parents involved, if such can be ascertained. The effect of the above statutory provisions is to provide that access to the records of the Internal Revenue Service and inquiries of the Internal Revenue Service are to be made only by the single State agency and only through the Department of Health, Education, and Welfare.

The location of absent parents against whom a support order is outstanding is one of those policy areas in which the Department of Finance and Control is accorded access to the entire case record of a particular AFDC recipient. The Connecticut plan provisions involved, as Connecticut stipulated at the hearing, further provide that the Department of Finance and Control is authorized to make direct inquiries of the IRS as to the location of parents whom they are unable to locate. Consequently, Connecticut law has delegated to the State Department of Finance and Control a function which the Social Security Act clearly contemplates is to be discharged by the single State agency. Therefore, I am forced to conclude that the Connecticut plan for AFDC fails to comply in this regard with the provision that it be administered by a single State agency, as set forth in Section 402(a)(3). It should be noted that I have indicated that Connecticut has submitted plan material which appears to correct this deficiency, and consequently, I have stated my intention to remove this issue from the hearing.

Issue No. 11

Inpatient Hospital Care - MA

This issue concerns whether the State of Connecticut's plan under Title XIX of the Social Security Act contains provisions for the payment of inpatient hospital care which are in conformity with the standards established by Federal regulations.

Section 1902(a)(13)(D) of the Social Security Act requires that a State plan for medical assistance must provide: "for payment of the reasonable cost (as determined in accordance with standards approved by the Secretary and included in the plan) of inpatient hospital services provided under the plan;". The standards established by the Secretary are basically those established for the payment of such hospital care under Title XVIII of the Social Security Act. These standards were originally set forth in HB Supplement D-5362 and 5364, and are now contained in 45 CFR 250.30 (b)(1). The Federal formula for the payment of inpatient hospital care

rests on two basic principles: it requires the inclusion of certain cost items in determining total cost and it requires a method of allocating costs between program beneficiaries and other patients which is designed to insure that the program does not bear any part of the costs of services to non-beneficiaries, and vice versa. The thrust of the Federal regulation is to reach a fair approximation of the costs of providing inpatient hospital care to Title XIX patients and to reimburse participating hospitals for those costs. In this regard, the regulation is perfectly consistent with the Act and with the legislative history as set forth in House Report No. 213, 89th Cong., 1st Sess. (1965)32. Moreover, these standards were upheld by a recent decision of the United States Court of Appeals for the Second Circuit in Catholic Medical Center of Brooklyn and Queens, Inc. v. Rockefeller.

The provision of Connecticut law called into question is Section 17-312 of the General Statutes of Connecticut. This statute provides that hospitals shall be reimbursed for the actual costs of providing inpatient hospital care to Title XIX patients, unless that cost exceeds the "charge to the general public for ward services or the lowest charge for semi-private services if the hospital has no ward facilities," in which case the hospital is reimbursed for the lower amount. Thus, if the hospital's charge for ward services or its lowest published charge for semi-private services is in excess of the actual cost of providing inpatient hospital care to Title XIX patients, then the hospital will be reimbursed for its actual cost, and the Federal regulation will be satisfied. However, in those cases where the charge for ward services or the lowest charge for semi-private services is less than the actual cost of providing such services to Title XIX patients, the hospital will not be reimbursed for its actual cost for providing such care. At the hearing, there was expert testimony to indicate that, because of the very low public demand for ward services, hospitals generally set the charge to the general public for such services at a level which does not reflect the actual cost of providing such services, intending to make up the deficit from charges for special services.

The effect of the Connecticut provision is to place a ceiling on the amount which can be paid to a participating hospital for inpatient care. Moreover, as evidence taken at the hearing demonstrated, the ceiling is one which will not, in many cases, reimburse the hospital for the actual costs of providing care to Title XIX patients, based as it is on the lowest published charge, and not on a system of average charges. Consequently, the effect of the ceiling may very well be to shift part of the cost of providing such care to Title XIX patients onto other paying patients, or the provision of substandard services to Title XIX patients. Either alternative would be contrary to the intent of the Congress. While Connecticut's response is that the concept of "reasonable

cost" should reflect the willingness of hospitals to accept and set lower rates for the services they provide, their primary support for this contention is drawn from Senate Report No. 91-1431, which is a report on a bill which has not as yet been enacted into law. Finally, Connecticut's own expert witness at the hearing, during the course of cross-examination, admitted that the Connecticut Title XIX plan did not conform in this regard with the requirements of Federal law. Accordingly, I am compelled to reach the same conclusion as did the Hearing Examiner on this issue and to determine that Connecticut has failed to comply with this requirement.

Issue No. 12

Standards of Eligibility - MA

This issue raises the question of whether the standards employed by Connecticut for determining who is medically needy within the meaning of Title XIX are in conformity with the requirements of Federal regulations, as set forth in 45 CFR 248.21(a)(1)(ii). This regulation provides that, if a State plan for medical assistance chooses to include the medically needy, it must set income levels for determining eligibility for such assistance which are comparable among individuals and families of varying size and which are, as a minimum, at the level of the most liberal money payment standard used by the State as a measure of eligibility in any categorical money payment program or at the level for which Federal financial participation is available, whichever is less. The precise issue involved is whether the income levels which Connecticut has established for determining the financial eligibility for medical assistance of families of one person or two persons are set at a level which complies with this standard. Connecticut has stipulated that its most liberal money payment standard for those size families is contained in the OAA, AB, and APTD programs and that the standard of those programs is higher than the standard used for determining the eligibility of such families under the MA program. By its own admission, therefore, Connecticut has admitted that its standard of eligibility for medical assistance fails to conform with the requirements of Federal law. Connecticut instead has chosen to challenge the validity of the Federal regulation.

Section 1902(a)(10)(B)(i) of the Act provides that, if a State chooses to include in the medical assistance program those who would not ordinarily be eligible for assistance under one of the other categorical programs, but who are still financially unable to meet their medical expenses (the "medically needy"), then eligibility must be determined in accordance with comparable standards. Similarly, Section 1902(a)(17) requires the State to include reasonable standards for determining eligibility which are comparable for all groups, and Section 1902 (a) (19)

requires that standards and procedures for determining eligibility shall be consistent with simplicity of administration and the best interests of the recipients.

In my opinion, the provisions of 45 CFR 248.71(a) are fully consistent with the statutory set forth in the aforementioned sections of the Social Security Act, for they address themselves to the eligibility of a group commonly referred to as the medically needy - a group which conceptually is supposed to be at least somewhat less needy than those eligible for any of the categorical programs. Consequently, if the state chooses to include this group in its Title XIX plan, it seems only reasonable to require that the minimum income level standard for determining their eligibility be set at the most liberal standard in any one of the categorical programs.

In its defense, Connecticut asserts that Section 1902(a)(17)(B) represents a Congressional determination that an individual or family is only medically needy if it would receive a money payment under one of the other categorical programs. However, that section of the Act deals only with the provisions relating to the disregard of earned income, and does not address itself to the question of what standards are to determine eligibility for medical assistance. Connecticut also maintains that eligibility determinations for the medical assistance program are more properly done on a case-by-case basis. However, it is clear to me that to provide for determination of eligibility on such a basis would be contrary to the clear intent of the Congress that the procedures and standards for determining such eligibility be consistent with simplicity of administration. Consequently, I am forced to conclude that the regulation in question is perfectly consistent with the intent of the Congress in enacting the Title XIX program, and that Connecticut's plan under Title XIX has failed to conform with the requirements of Federal law and regulations.

Having determined, with regard to the issues raised by the hearing notice, that the Connecticut plans for OAA, AFDC, AB, APTD, and MA fail to conform with the relevant requirements of Federal law, I must now determine the appropriate sanction for this nonconformity. Questions of the proper construction of these sections and of the nature of the discretion which they vest in the Secretary have been thoroughly discussed in my prior conformity decisions. These sections clearly grant the Secretary the authority to withdraw all Federal financial support for a particular State plan which has been found to fail to conform to the requirements of Federal law. However, these sections also vest the Secretary with discretion to apply a sanction that is less than total fund withdrawal, leaving some degree of flexibility in tailoring the remedy to the violation found.

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As regards Issue No. 1(b), the nonconformity arises from the State's imposition of a ceiling on the application of the earned income disregard. This particular defect in Connecticut's AFDC plan could potentially affect every AFDC case, and could also result in the denial of assistance to otherwise eligible individuals. Moreover, as the violation results in the State spending less for AFDC assistance than it would if it fully complied with Federal requirements, it would be extremely difficult to fashion a partial termination remedy that would operate as an incentive for the State to comply with the requirements of Federal law. Finally, because the "services part" of the AFDC program is so closely integrated with the "assistance part" of the program, I deem it inappropriate to treat them as separate in fashioning a remedy for this particular nonconformity. Accordingly, I order that, as the sanction for the nonconformity found in regard to this issue, all Federal financial assistance for the AFDC program be withheld until such time as Connecticut conforms to the requirements of Section 402(a)(8) and 45 CFR 233.20(a)(11)(ii)(B).

As regards Issue No. 2, the nonconformity lies in the fact that Connecticut, in all its public assistance programs, is applying an incorrect method for computing earned income disregards. As I have indicated previously, this is the very same issue which was raised with regard to Arizona's AFDC program in that conformity hearing. The considerations which led me to order a total withdrawal of Federal financial assistance to the Arizona AFDC program, lead me to similarly conclude in this case that the appropriate sanction is to withhold all Federal financial support for the OAA, AFDC, AB, and APTD programs of the State of Connecticut until such time as Connecticut's plans for those programs conform with the requirements of 45 CFR 233.20(a)(7)(i).

As indicated earlier, I have also found that the provision in Connecticut's plans for OAA, AFDC, AB, and APTD, which recognizes only certain mandatory payroll deduction items as expenses "reasonably attributable to the earning of income", fails to conform with the relevant requirements of Federal law, as they have been interpreted in 45 CFR 233.20(a)(6)(iv). This defect also potentially affects all applicants for and recipients of assistance under all of these plans. Moreover, because it could operate as a disincentive to secure and maintain employment, it represents a very serious defect in these public assistance programs. Accordingly, I deem the appropriate sanction to be the withholding of all Federal financial support for all these programs until such time as the requirements of Federal law are satisfied.

As regards Issue No. 9, the nonconformity lies in the fact that the State has failed to implement, in its AFDC plan and in its MA plan as it relates to AFDC recipients, provisions for testing a simplified method for determining eligibility. This requirement of Federal law is based on a

provision in each particular title of the Act relating to the appropriate method for administering the program. The failure to implement the testing program results in the State agency's carrying out its administrative responsibilities in a way not authorized by the Secretary. In my opinion, the denial can be viewed as affecting only that aspect of the program which relates to its administration and the costs incurred therefor can be considered part of the program distinct from other parts of the program. Accordingly, I order, as a remedy for this nonconformity, that the Connecticut State Welfare Department may no longer accept Federal financial support for the expenses incurred in the administration of the AFDC and MA programs.

With respect to Issue No. 10(a), the nonconformity again primarily arises out of the administration of the OAA, AFDC, AB, APTD, and MA programs. Consequently, I think that the appropriate sanction for this nonconformity is the withdrawal of Federal financial support for the expenses incurred by the Department of Social Welfare in the administration of all of its public assistance programs.

With respect to Issue No. 10(b), the nonconformity arises from the fact that Connecticut law permits an agency other than the single State agency to perform a function, the making of inquiries of the Internal Revenue Service regarding the location of absent parents, which under Federal law should be vested in the single State agency. Again, this requirement is one which relates to and arises out of the administration of the AFDC program. I deem the appropriate sanction for this defect to be the withdrawal of Federal financial support for the costs of the administration of the Connecticut AFDC program.

As regards Issue No. 11, the nonconformity arises out of the State's failure to use the proper formula for the payment of the reasonable costs of inpatient hospital care under the Title XIX program. As indicated in the briefs filed on this point, the House Report on the Social Security Act Amendments of 1967 specifically mentions this situation as an example of one where the partial withdrawal of Federal financial support would be an appropriate remedy. (See House Report No. 544, 90th Cong., 1st Sess. at p. 113) Consequently, as the sanction for the nonconformity which I have found with respect to Connecticut's program for medical assistance, I order the withdrawal of all Federal financial support which relates to financing the costs of inpatient hospital care under Connecticut's Title XIX program.

With respect to Issue No. 12, the nonconformity lies in the State's failure to use the proper standards for determining the eligibility for medical assistance of the medically needy. While I have been urged to do so, I do not feel it appropriate to consider that aspect of Connecticut's MA program which relates to the medically needy to be a distinct part

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of the program. Moreover, the effect of the nonconformity is to render ineligible people who would otherwise be eligible if the state were applying the proper standards for determining such eligibility. The result of this nonconformity is that the State of Connecticut is spending less for public assistance than it would if it fully complied with the requirements of Federal law. Accordingly, I have determined that the appropriate sanction is to withdraw all Federal financial support for Connecticut's program under Title XIX of the Social Security Act.

The sanctions which I have ordered herein are to become effective July 1, 1971, the date of the next Federal grant award. As I have indicated in the course of this decision, Connecticut has indicated that it is in the process of attempting to resolve many of the issues to which I have addressed myself in this decision. Hopefully, some of these issues will be so resolved before the effective date of this decision.

As provided under 45 CFR 213.32(d), this decision constitutes the final decision of the Secretary on this matter.

John D. Twiname
Administrator, Social and
Rehabilitation Service

Washington, D. C.
May 28, 1971

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1741

NATIONAL WELFARE RIGHTS ORGANIZATION, ET AL.,
APPELLANTS

v.

F. DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

FEB 20 1976
NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action 75-0956)

Argued November 4, 1975

Decided February 20, 1976

Henry A. Freedman and *Steven J. Cole*, with whom *Florence Roisman*, was on the brief for appellant organizations.

Lawrence Silver, Deputy Attorney General, Chief, Litigation of the Commonwealth of Pennsylvania was on the brief for appellant Commonwealth of Pennsylvania.

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Joel J. Rabin, Assistant Attorney General, State of Maryland, was on the brief for appellant State of Maryland.

Ronald A. Zumbrun, John H. Findley, John H. Milden, Jr., and *Glenn E. Davis*, filed a brief on behalf of Pacific Legal Foundation as *amicus curiae* urging affirmance.

Before: WRIGHT, *Circuit Judge*, LUMBARD,* *Senior Circuit Judge* for the Second Circuit and TAMM, *Circuit Judge*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: This appeal challenges the validity of a recent regulation promulgated by the Secretary of Health, Education and Welfare ("HEW") which purports to specify maximum amounts of resources allowable to recipients of Aid to Families with Dependent Children ("AFDC"), types of resources which are exempted in whole or part, and the manner of valuation of these resources. Plaintiff-appellants—Pennsylvania, Maryland and various organizations representing welfare recipients—allege, generally, that the regulation impinges the power granted by Congress to states to determine the resources a needy family may retain and, specifically, that the regulation is arbitrary and capricious because it contravenes the aims of AFDC and is unsupported by factual bases in the administrative record. Although we affirm the trial court ruling that the Secretary has power to promulgate regulations prescribing valuation, exemptions, and upper limits on resources of AFDC recipients, we reverse the judgment upholding the challenged rule. Not only does the regulation at issue here conflict with its enabling statute insofar as it values property without regard to encumbrances, but also the scanty administrative record is insufficient to support the factual determinations expressed in the rule.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

I. Contested Regulation

On July 9, 1973, HEW gave notice of a proposed rulemaking which would establish limits on resources.[1] 38 Fed. Reg. 18254. Two years later HEW promulgated the regulation at issue which provides in pertinent part:

> The amount which may be reserved by an AFDC family of up to 4 persons, other than the reasonable value of a home as determined by the State agency, wedding and engagement rings, heirlooms, an automobile of a retail market value of $1200 or less and equipment and material of reasonable value necessary to implement a plan, approved by the agency, for employment, or rehabilitation, shall not be in excess of a market value of $2250. If the retail market value of the automobile exceeds $1200, the excess value shall be counted against the personal property reserves. For each additional eligible person, an additional $100 in personal property reserves above the $2250 limit may be allowed. Real and personal property shall be valued at their gross market value including encumbances.

40 Fed. Reg. 12507 (1975).[2] The promulgation also

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[1] The proposed regulation differed from the final regulation in that it exempted the entire value of the home for adult recipients and allowed no exemption for a motor vehicle owned by an AFDC family. 38 Fed. Reg. 18254, § 233.20(a)(3)(1973). Under the present regulation, the $1200 value is exempt if used pursuant to an approved plan of employment or rehabilitation. Any excess is counted in the family's $2250 resource allowance. In either case, the value is "retail market value," the selling price on the open market in that geographical area, without consideration of encumbrances.

[2] The regulation sets different resource limitations for recipients of four other welfare programs administered by HEW—Old Age Assistance ("OAA"), Aid to the Blind ("AB"), Aid to the Permanently and Totally Disabled ("APTD"), and Aid to the Aged, Blind or Disabled

responded briefly to six "primary" types of objections raised in the 57 comments received during the rulemaking.

In June of 1975, plaintiffs filed the complaint in this case and obtained a temporary restraining order prohibiting the AFDC portion of 45 C.F.R. § 233.20(a)(3)(i) from going into effect on June 17. Before the trial court ruled on plaintiffs' motion for a preliminary injunction, the Secretary republished the challenged regulation with an expanded preamble explaining the basis and purpose of the regulation and responding further to comments. 40 Fed. Reg. 30963 (1975). The trial court subsequently denied plaintiffs' motion for a preliminary injunction and granted defendant's motion for summary judgment. It held that the Secretary is authorized by statute to regulate amounts and valuation of resources retained by AFDC families and that the regulation is both reasonable and issued in compliance with the Administrative Procedure Act. J.A. at 223-24. The judge, however, stayed the effective date of the regulation in order to give plaintiffs time to appeal. Plaintiffs appealed and this court extended the stay.

We face two distinct issues in this appeal. We must first decide whether the Secretary has the power to regulate standards indicating the resources to be considered against the state standard of need, a maximum limit on those resources, and the proper valuation of them. Second, if we find that such power exists, we must still determine whether the Secretary exercised that power reasonably and in accord with procedural mandates. We turn now to the issue of the Secretary's authority.

("AABD"). The regulation allows a maximum figure of $2250 for the spouse and recipient of these programs; it also exempts personal effects and an automobile and income-producing property, regardless of value. Plaintiffs have not challenged these portions of the rule affecting adult welfare programs.

II. Power to Regulate

AFDC was established under the name of Aid to Dependent Children in Title IV of the Social Security Act of 1935, P.L. 74-271. Now, as then, the basic scheme of the assistance program is that the federal government provides funds to the states for distribution to needy children under a plan approved by the Secretary.[3] In order to be approved, state plans must meet specifications set out in 42 U.S.C. § 602(a) (Supp. III 1973),[4] and may not impose a more stringent residency requirement than that prescribed in the statute, *id.* at § 602(b). Any plan which meets these requirements must be approved by the Secretary. *Id. See also Arizona State Department of Public Welfare v. HEW*, 449 F.2d 456, 461, *rehearing and rehearing en banc denied* (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

Section 1302 grants to the Secretaries of HEW, the Treasury, and Labor the authority to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter." Under this broad grant of power, the Secretary may promulgate regulations binding on the states. *King v. Smith*, 392 U.S. 309, 317 (1968); *Arizona*

[3] The 1935 Act provided for administration by the Federal Security Administrator, but these functions were transferred to the Secretary of HEW by section 5 of the 1953 Reorganization Plan No. 1. *See* 42 U.S.C. § 601 notes (1970).

[4] These requirements include, *inter alia*, statewide effect, financial participation by the state, central administration, disregard of portions of income of independent children and their relatives receiving aid, provision of family services, and consideration of resources and income of recipients. The regulation at issue in this appeal attempts to set guidelines for the required consideration of income and resources specified in section 602(a)(7).

State Department of Welfare v. HEW, *supra*, 449 F.2d at 467; *Solman v. Shapiro*, 300 F. Supp. 409, 413 (D. Conn.), *aff'd per curiam*, 396 U.S. 5 (1969). In upholding a different HEW regulation, one court described this far-ranging authority as follows:

> A more plenary great [*sic*] of rule-making power would be difficult to devise. . . .
>
> The breadth of the rule-making authority of § 1302 is underscored when seen in the perspective of the entire federal statutory scheme of public assistance. The various programs provided for authorize the Secretary of HEW to require, in the welfare field, that each state incorporate in its plan "such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan. . . ." It is clearly contemplated that in this way the Secretary can, through review and scrutiny of state plans, be instantly apprised of problems in the federally-funded assistance programs and rectify or eliminate troublesome areas in whatever way he, as his expertise may direct him, finds most effective and within the purposes of the public assistance statutory fabric.

Serritella v. Engleman, 339 F. Supp. 738, 752 (D.N.J.) (footnote omitted), *aff'd per curiam*, 462 F.2d 601 (3d Cir. 1972).

Appellants here do not deny this general power to regulate, but argue that the exercise of authority is invalid because it is inconsistent with the Act. The major thrust of plaintiffs' argument is that Congress, in enacting the Social Security Act of 1935, set up a basic federal framework for assistance to dependent children within which the states were free to determine the standard of need and level of benefits. They argue that legislative history and recent Supreme Court decisions conclusively prove that HEW's regulation goes far beyond

the limited federal rule envisioned by Congress. HEW, on the other hand, refers us to the basic assumption that federal spending may be limited by the department charged with administration of the assistance program and to the fact that since 1955 HEW has prescribed a maximum on resources. For the reasons discussed below, we hold that the type of regulation challenged in this case is consistent with the cooperative spirit of federalism pervading assistance programs.

The legislative history of the Social Security Act of 1935 reveals that Congress intended to leave to the states many determinations in the administration of the program.[5] Representative Doughton, in reporting the bill from the House Ways and Means Committee, stated:

> In fact, these provisions limit very strictly the supervisory powers of the Social Security Board over the States, and provide a maximum of State control

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[5] This acknowledgment of states' interests and responsibilities for children seems to have been in partial recognition of states' rights, even at the expense of national uniformity.

> Mr. KELLER. I am going to say that the committee has done a wiser thing than I had sought to do, though we are looking at the same subject with the same object in view. That is this: I was perfectly willing that the Government should pay, but when I came to study it over I had to agree that as a matter of organization the people in the locality know what ought to be paid to the different ones better than any possible Government agency. . . .
>
> Mr. LUNDEEN. Should not all American citizens be treated alike?
>
> Mr. KELLER. I agree with the gentleman, because, let me confess, I am a nationalist, broadly speaking, but I must, nevertheless, understand and keep in mind that there is a reason for the existence of the States and their sovereignty as it has existed.

79 CONG. REC. 5550 (1935).

> in these matters. The federal standards or conditions included in the law may, indeed, be regarded as minimum conditions, leaving to the States the determination of policies, the detailed administration, the amount of aid which shall be given, and questions of personnel.
>
> . . . .
>
> It takes into account the variations in standards and in cost of living in different parts of the country. . . .

79 CONG. REC. 5469-70 (1935). In another colloquy, Representative Doughton again stressed the state responsibility for determining the amounts to be received:

> Mr. McLAUGHLIN. May I inquire how the determination is to be made in the individual's case as to the amount which that individual is to obtain?
>
> Mr. DOUGHTON. That will be under State law and will be determined entirely by State law.
>
> Mr. McLAUGHLIN. Will there be different formulas set up in the different States, or will there be one national formula?
>
> Mr. DOUGHTON. No; the National Government will not have anything to do with it. The administration of the law is left entirely to the States.

Id. at 5474. The legislative history in the Senate points out that this state determination was permitted in large part to assure that poor states could limit the amount of aid given:

> A State will not have to aid every child which it finds to be in need. Obviously, for many States, that would be too large a burden.
>
> Senator Harrison, 79 CONG. REC. 9269 (1935).

The Supreme Court has reasserted in numerous welfare cases the cooperative federalism underpinning the

AFDC program. *See, e.g., New York Department of Social Services v. Dublino*, 413 U.S. 405, 414 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 542, *rehearing denied*, 409 U.S. 898 (1972); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *King v. Smith*, *supra*, 392 U.S. at 316 (1968). Each state has the undisputed power to determine the standards of need and the level of benefits. *King v. Smith*, *supra* at 318-19. The standard of need is "the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). The level of benefits is the amount of the need which the state chooses to pay.

Plaintiffs argue that the regulation challenged here invades the province of the states because it requires the programs to apply national standards, rather than to exercise the discretion granted them by Congress. The standard of need, they contend, includes the establishment of reserves and must, therefore, be determined by the states, and not by HEW.

We find this argument unconvincing for several reasons. First we note the gradual legislative encroachment on state determinations via amendments of the 1935 statute, including the 1939 amendment requiring states to consider income and resources of the recipients. We also consider persuasive the fact that, although HEW has prescribed a dollar maximum on resources since 1955, Congress has not sought to limit this regulatory activity despite subsequent revision of section 602(a)(7). Finally, careful reading of the Supreme Court cases does not lead us to believe that standard of need, clearly determinable by the state, perforce includes standard of reserves. We shall discuss these reasons *seriatim*.

The regulation in question attempts to set federal guidelines for section 602(a)(7) which requires state plans to take into consideration any income or resources

of the recipient. The subsection was added in 1939, 53 Stat. 1379, to assure that benefits were available only for needy children. One court has described the provision as a precaution to assure that "no Little Orphan Annie will receive public assistance if she has a Daddy Warbucks." *Arizona State Department of Public Welfare v. HEW*, *supra*, 449 F.2d at 469 n.19. An identical provision was also inserted into the requirements for old age assistance and aid to the blind; legislative history of all three provisions, therefore, is relevant to the issue before us.

From the limited discussion of the income and resources amendment, no clearcut Congressional intent appears. A House floor debate on the proposed amendment, H.R. 6635, revealed conflicting views. Representative McCormick expressed his opinion that

> what constitutes need is left to the States; in other words, the Federal Government, by the Social Security Act, does not undertake to say to any State what constitutes need. For example, one State might exempt the equity in a house up to $2,000, another one $3,000, while another State might say, "No; we will allow no equity." The Federal Government does not concern itself with that, but leaves the matter entirely up to the States.

84 CONG. REC. 6704 (1939). *See also id.* at 6852 (remarks of Representative Stefan). Representative Duncan, however, criticized states which required absolute necessity and insisted that "that is absolutely not required under the Federal Social Security Act," *id.* at 6704, suggesting that state discretion was indeed limited by federal guidelines. Representative Brewster also declared that the new amendment was restrictive in that the language mandated states to take resources such as house equity into consideration. *Id.* at 6765. At a later debate on Representative Dirksen's proposed amendment

to H.R. 6635 which would have forbidden states to consider resources of adult children or relatives of old age recipients. Representative Poague asserted that the federal agency might use the income and resources clause to force states to remove certain recipients from the welfare rolls, *id.* at 6922, but Representative Magnuson insisted that which resources should be taken into consideration was a matter for the state. *Id.* Even if we were examining the issue of the Secretary's power to regulate resource limitations illumined only by the conflicting history of the 1939 amendment,[6] we find the disparate views expressed and the minor weight to be given floor debate, *see* 2A, SUTHERLAND, STATUTORY CONSTRUCTION 217, § 48.13 (4th ed. 1973), insufficient to rebut the broad grant of rulemaking authority.

We are, moreover, cognizant of the continuing development of the Act in the more than 25 years since subsection 7 first appeared and would be remiss in ignoring this evolution of the AFDC program. Since its inception in 1935, AFDC has encountered continuing legislative concern and action.[7] As national attitudes changed toward assistance programs, Congress reflected these

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[6] Rejection in the Senate of the Schwellenbach amendments to H.R. 6635 which, *inter alia*, would have prevented denial of old-age assistance to persons owning real property of $2500 and personal property of $500, 84 Cong. Rec. at 9004-06 (1939), does not resolve the conflict. The rejection may have stemmed from the other attached provisions, the amounts suggested, or general disagreement as to whether an amendment to subsection 7 was necessary in order for the federal plan to be able to set resource limits.

[7] In addition to the 1939 amendment adding clause 7, Congress also amended requirements for state plans in 1950, 64 Stat. 549, 558; 1956, 70 Stat. 849; 1962, 76 Stat. 185, 188; 1965, 79 Stat. 418, 423; 1968, 81 Stat. 877, 879, 881, 890, 892, 895, 896, 898; 1971, 85 Stat. 803, 804; 1972, 86 Stat. 1462, 1492; and 1975, 88 Stat. 2348, 2349, 2359, 2360.

opinion swings by amending the structure of the AFDC program. In this way Congress deleted the provision allowing states to impose moral standards on recipients, *see King v. Smith*, *supra*, 392 U.S. at 320-26; it also added to section 602(a), which prescribes requirements for state plans, subsections compelling states to encourage work programs by discounting portions of income, § 602 (a)(8) (1939), and disregarding any expenses reasonably attributable to earning such income, § 602(a)(7) (1962). Amendments even limited the right to determine need by requiring the states to adjust amounts to reflect cost of living increases, § 602(a)(23) (1968). It is clear that under the Supremacy Clause state plans must conform to these amended requirements. *King v. Smith*, *supra*, 392 U.S. at 333 n.34. While the Court has been hesitant to find total preemption of state discretion, *New York Department of Social Services v. Dublino*, *supra*, 413 U.S. at 418-22 (work programs), it has struck down state regulations which violate the spirit of the amendments. *See, e.g., Shea v. Vialpando*, *supra*, 416 U.S. at 263-65 (Colorado fixed sum for earning expenses regardless of actual costs); *King v. Smith*, *supra*, 392 U.S. at 325-27 (Alabama "substitute father" rule); *Lewis v. Martin*, 397 U.S. 552, 557-60 (1970) (California statute requiring consideration of income of nonadoptive stepfather or man assuming the role of spouse without proof of actual contribution). This increased control over state AFDC programs leads us to believe that whenever Congress has acted to limit state choices, it is reasonable to presume that Congress also intended to extend the Secretary's rulemaking authority in that area of concern. *See generally Almenares v. Wyman*, 334 F. Supp. 512, 521 (S.D.N.Y. 1971), *modified on other grounds*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

In addition to this history of increasing requirements for state plans, and thus restricting state discretion, we note that since 1955 HEW has imposed limitations on

the states regarding income and resource considerations. The Supplement to the 1955 *Handbook of Public Assistance Administration*, a widely distributed manual recognized by the Supreme Court in *King v. Smith*, *supra*, established limits of $1500 per recipient.[8] In 1966 the Secretary increased the limit to $2000 per recipient, *id.*, § 3021 (1966), a limit which later appeared in HEW regulations, 45 C.F.R. § 233.20(a)(3)(i) (1974). For 20 years HEW has imposed maximum limits in approving state plans. The challenged regulation, therefore, is unique in its resource limit provisions only because the amount of $2250 for a family of four is considerably less than the $8000 figure applicable from 1966 until the present. While appellants may seek to challenge the amount selected as arbitrary, they can hardly argue that the Secretary is suddenly usurping state power by setting any limit at [illegible]. We note also that Congress amended Section 602 [illegible] in 1962 to assure that expenses incurred in earning an income would be deducted from income considered by the state. Even if the legislative history of the 1939 amendment does not specifically support a grant of rulemaking authority at that time, Congress appears to have acquiesced in the Secretary's power to set resource limits by allowing the limitations to stand when it reconsidered the Act.[9] *See generally*

[8] The *Supplement* provided in pertinent part:

> At the present time, $1,500 is the maximum limit that has been approved for any State plan when specified sums are set out for specified types of property. When the State uses the $1,500 limit, it has been requested to bring the automobile within the $1,500, although all states do not do so.

HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION OF 1955 SUPPLEMENT FOR ADMINISTRATIVE USE, § 3120 (1955).

[9] This finding of acquiesence is buttressed further by the disinclination of Congress to amend section 1302. During the 1972 amendment of the Social Security Act, the Senate

Snell v. Wyman, 281 F. Supp. 853, 867 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 323 (1969).

In light of this power to set maximums, we see no reason to believe that Congress meant to prohibit the Secretary from determining the manner in which resources will be valued. The Ninth Circuit has rejected a similar challenge to HEW regulations, *Arizona State Department of Public Welfare v. HEW*, 449 F.2d 456 (1971). The court upheld a regulation based on section 602(a)(8) prescribing the manner in which earned income would be disregarded.[10] Arizona challenged the regulation as violative of the state's power to set the standard of need and level of benefits. Looking to the general regulatory power of section 1302 and the specific language of section 602(a)(8), the court rejected Arizona's claim. The court also validated a regulation calling for a state-level advisory committee:

> More than most statutes, the Act was and is responsive to the changing landscape of American society; its beneficent purposes would be stultified by rigidly attributing to each Congressional attempt to improve the Act's responsiveness a concomitant Congressional intent not to permit further administrative improvements by those charged with the Act's implementation.

Id. at 472.

Report of H.R. 1 proposed limiting the Secretary's rulemaking authority "so that it may issue regulations only related to specific provisions of the Act," rather than the broad language currently existing. S. REP. No. 92-1230, 92d Cong., 2d Sess. 460 (1972). The bill finally adopted did not contain this limitation. *See* H.R. No. 92-603.

[10] The regulation prescribed that expenses should be deducted from gross income, *i.e.*, total income minus income disregarded under section 602(a)(8), while the Arizona plan provided that expenses would be deducted from gross income before determining the amount of income to be disregarded. 449 F.2d at 469-70.

The power to determine which assets may be disregarded—heirlooms, a home of reasonable value, business tools—presents slightly greater problems. The states for 40 years have made these determinations with little or no restriction by HEW. We cannot, however, say with any certainty that the area is one forbidden to the Secretary. It would seem, instead, that HEW has recognized for some time its ability to set limits on state discretion in these matters, but has elected not to do so. The first *Handbook*, prepared in 1949, gave wide latitude to state policies that provide "[d]efinitions of the amounts of real and personal property that can be retained, . . . *provided, that such definitions will assure that only needy individuals are eligible*" (emphasis added). 1949 *Handbook* at § 3120(1). In the 1955 *Handbook: Supplement for Administrative Use*, section 3120 noted HEW's preference for the states to include the value of the car if they allowed the maximum limit. See note 8 *supra*. It also indicated that HEW had decided "at present" not to set any maximums on certain resources as long as the states responded within the "rule of reason." 1955 *Handbook Supplement* at § 3120(1). The 1966 *Handbook* observed that within the $2000 per recipient maximum no specific limit had been set on the home, personal property, automobile and income-producing property; the states were cautioned, however, that the definitions must "assure that only needy individuals are eligible." § 3120 (1). HEW has also prohibited states from counting home produce, section 3121; loan proceeds used to purchase property not convertible for current needs, section 3122; and small infrequent gifts from relatives, section 3123. *Id.* The fact that in the past HEW has allowed states to operate with great latitude in setting specific limits for such items as housing, automobiles, and personal property does not indicate a restrictive interpretation by the department of its power to regulate. The manuals and subsequent regulations reveal an underlying assump-

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tion that the Secretary could set these limits whenever necessary to assure that AFDC benefits would go to needy individuals.

Neither do we believe that these limits destroy the state's power to determine a standard of need. *See, e.g., King v. Smith, supra,* 392 U.S. at 318-19 n.14. Each state still must determine the amount necessary to maintain a family (or individual recipient) in that state, including the sum required for items such as housing, transportation, and clothing. This flexibility is sufficient to assure that the state retains substantial control over the determination of who is a needy individual in spite of national rules for counting each family's resources. *See generally Arizona State Department of Welfare v. HEW, supra,* 449 F.2d at 470-71; *Connecticut State Department of Public Welfare v. HEW,* 448 F.2d 209, 215 (2d Cir. 1971). A family limited to $2250 of reserves will continue to receive benefits based on the sums which its state determines are necessary in that locale. For example, a state which determines that transportation expenses are high because recipients must obtain reliable vehicles to traverse long distances over difficult terrain may adequately protect the interests of recipients by setting a higher standard of need, even though the challenged regulation would count any auto value over $1200 as a resource to be considered against the standard of need.

For these reasons, we do not believe that this type of regulation impermissibly limits the states in their cooperation with the federal government to provide funds for families with needy children; it is therefore within the rulemaking authority of the Secretary.[11]

[11] As a peripheral matter we observe the unusual posture which plaintiff welfare organizations have assumed in this case: arguing for supremacy of state standards over federal guidelines. Because federal standards have in the past been

IV. Validity of Regulation

Plaintiff-appellants allege that, even if the Secretary has power to regulate standards for resources, the promulgated rule is invalid because it conflicts with the purposes of the Act and because HEW failed to articulate sufficient bases for the changes.

The standards by which we must evaluate the challenged regulation are lenient ones which require great deference to the Secretary's expertise. A regulation promulgated under such a broad grant of authority is valid if it is "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Services, Inc.*, 411 U.S. 356, 369 (1973), *quoting Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 280-81 (1969). This standard applies to HEW regulations promulgated under section 1302, *Johnson's Professional Nursing Home v. Weinberger*, 490 F.2d 841, 844 (5th Cir. 1974). Other courts have tested AFDC regulations by determining if they were unreasonable and contrary to the Act. *Connecticut State Department of Public Welfare v. HEW*, *supra*, 448 F.2d at 216; *Almenares v. Wyman*, *supra*, 334 F. Supp. at 521. *See also* 42 U.S.C. § 1302.

In addition to these substantive standards, a regulation must be promulgated in accord with procedural requirements of the Administrative Procedure Act

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more generous and provided greater benefits, welfare organizations have argued traditionally that states should not be able to subvert federal policies. *See, e.g.*, New York Department of Social Services v. Dublino, 413 U.S. 405 (1973); Lewis v. Martin, 397 U.S. 552 (1970); Houston Welfare Rights Organization, Inc. v. Vowell, 391 F. Supp. 223 (S.D. Tex. 1975); *cf.* National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861 (D.D.C. 1974). It would seem that the highest possible benefits, and not the highest form of federalism, is the objective of non-state plaintiffs.

("APA"), 5 U.S.C. §§ 551 *et seq.* (1970), and any further rules imposed by the department itself. *Rodway v. Department of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975). *See also* 36 Fed. Reg. 2532 (1971), adopting § 553 requirements for HEW rulemaking. The income and resource regulation challenged here was promulgated following notice and opportunity for comment,[11] 38 Fed. Reg. 18254 (1973), but plaintiffs claim that in spite of these actions, 45 U.S.C. § 233.20(a)(3)(i) violates section 706(2)(A) of the APA[12] because the notice and subsequent promulgation failed to provide the factual objective support for the regulation necessary for proper judicial review. We find merit in both of appellants' claims.

A. *Contrary to Statute*

Both the standard of "reasonably related" and the statutory prohibition against regulations "inconsistent with this chapter," 42 U.S.C. § 1302, recognize that regulations must advance, rather than impede the legis-

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[11] The rulemaking was done pursuant to 5 U.S.C. § 553(c) (Supp. IV 1974), which provides in pertinent part:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

[12] This statute provides that the reviewing court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

5 U.S.C. § 706(2)(A) (1970).

lative goals. The general objectives of the AFDC program appear in 42 U.S.C. § 601 (1970):[14]

> [f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assistance and rehabilitation and other services . . . to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . .

The Secretary argues that the fair market value rule is related to the objectives that only the needy receive aid and that recipients be helped to attain financial independence. We find it unnecessary to decide if the application of this provision is reasonably supportive of either objective[15] because it clearly conflicts with other

[14] This overall purpose is supplemented by specific objectives inferable from individual provisions of the Act, such as encouraging employment, sections 602(a)(8), (14), (15); 609.

[15] We do observe, however, that much of HEW's argument is unsupported by fact and is often specious. For example, HEW alleges that compelling states to disregard encumbrances will discourage recipients from buying luxury items on credit and thus avoid the burdensome monthly payments that drain their limited finances. HEW, however, has not attempted to limit this rule to luxury items and would also apply it to items such as refrigerators, furniture, and automobiles necessary for work; there are, moreover, no facts to show that AFDC families purchase a great many luxury items. Compelling a recipient to dispose of a heavily-encumbered item basic to maintenance (or one worth less than the amount of encumbrance) places the individual in a far worse living condition without improving his ability to meet daily needs. It is extremely difficult to see a reasonable relationship between the effects of this rule and its avowed purpose of aiding the recipient to become independent. The Secretary also claims that this method of valuation will prevent pay-

provisions of the Act, as expressed in the statute itself and in the pertinent regulations.

Numerous cases within the past few years have held invalid state regulations that include as resources income not actually available for maintenance of the recipients. *See, e.g., Shea v. Vialpando*, 416 U.S. 251 (1974) (standard allowance for work-related expenses); *Lewis v. Martin*, 397 U.S. 552 (1970) (support from nonadoptive stepfather or MARS); *Johnson v. Harder*, 383 F. Supp. 171 (D. Conn. 1974), *aff'd per curiam*, 512 F.2d 1188 (2d Cir. 1975) (surplus OASDI benefits); *National Welfare Rights Organization v. Weinberger*, 377 F. Supp. 861 (D.D.C. 1974) (recoupment of overpayments); *cf. Riemer v. Hooker*, 392 F. Supp. 145 (D.N.H. 1975) (child care costs). Prior to the 1975 revisions, HEW regulations specified that "only such net income as is actually available for current use on a regular basis will be considered and only currently available resources will be considered." 45 C.F.R. § 233.20

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ments to "those who have placed themselves in a position of need due to the purchase of heavily encumbered items." 40 Fed. Reg. 30963 (1975), preamble to regulation as republished. This rationale ignores the fact that no recipient could place himself in need in this manner under a valuation system which considers encumbrances. The equity, equal to his investment, would still be counted as a resource. Furthermore, payments are not subtracted from his available income or added to the statewide standard of need. For example, a family of four with $2300 in assets could not come within the limitations by investing $100 in a $100 refrigerator. The $100, and subsequent monthly increases in equity, would still be attributable to the family. No economic sleight of hand can make this disappearing asset theory any more than an illusion. The only reason advanced by the Secretary which appears clearly related to the regulation is to assure that AFDC families appear poorer than non-benefited families. Although we need not decide the issue, we doubt whether this aim can be presumed from the benificent objectives specified in section 601.

(a)(3)(ii)(c) (1974). Relying in part on this regulation, courts have struck down state plans which valued property without regard to encumbrances. *Green v. Barnes*, 485 F.2d 242, 244 (10th Cir. 1973); *Smithson v. Flowers*, Civ. No. 74-18CH (S.D.W.Va. April 18, 1974); *see also, Gillett v. Rose*, Civ. No. 216166 (Utah Dist. Ct. Jan. 10, 1974) (mortgage disability insurance benefits).

Defendants urge that these cases are inapposite inasmuch as they rely on the availability requirement which existed prior to this regulation. The revised regulation still requires states to consider "currently available resources," § 233.20(a)(3)(ii)(c), but (a)(3)(i) specifically decrees that this available real and personal property must be valued without regard to encumbrances.

Contrary to HEW's assertions, we believe that availability is required by the statute as well as by the regulation and that failure to consider encumbrances is inconsistent with other interpretations of the requirement. In *King v. Smith*, the Supreme Court noted that the availability regulation "clearly comports" with the purposes of section 602(a)(7), and "properly excludes" resources merely assumed to be available. 392 U.S. at 319 n.16. This interpretation of the statute was reaffirmed in *Lewis v. Martin*, *supra*, 397 U.S. at 555. *See also Solman v. Shapiro*, *supra*, 300 F. Supp. at 415. We cannot accept HEW's contention that because the property itself is available, gross market value (and not the equity) is available. *Contra Wheat v. Hall*, 32 Cal. App. 3d 928, 108 Cal. Rptr. 508, 113 Cal. Rptr. 873 (Ct. App. 1973), *cert. denied*, 415 U.S. 925 (1974). Such an interpretation is in direct opposition to the principles which require valuation of life insurance at its cash value, *Wilczynski v. Harder*, 323 F. Supp. 509 (D. Conn. 1971), and consideration of the actual expenses in earning income, *Shea v. Vialpando*, *supra*, as

were to contrary to fiscal realities." The courts' unwillingness to assume benefits not actually in existence is explained in *Cooper v. Laupheimer*, 316 F. Supp. 264, 269 (E.D. Pa. 1970) as a response to "the reality of public welfare—the necessity of current payments for current needs." To assume that furniture worth $200 on which a family still owes $180 can be miraculously converted into $200 defies the laws of economics and punishes welfare recipients for the type of credit purchases also common to working families. Just as AFDC prohibits the assumption of current availability of potential income or income expended as earning costs, so does it prevent the presumption that encumbered property has a value to the HEW recipient of its total fair market value.

We are confident that HEW can find ways to regulate consideration of these resources without distorting the financial realities. *See, e.g., Gillett v. Rose, supra*, unreported opinion at 4-5 (mortgage disability insurance payments may be counted only to the extent of rent or home maintenance need); *Riemer v. Hooker, supra*, 392 F. Supp. at 146-47 (allowing state to pay child care costs rather than allowing as an AFDC deduction). The method selected here, however, must fail because it conflicts with the spirit of the AFDC program.

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[18] *See also* Hein v. Burns, 402 F. Supp. 398 (S.D. Iowa 1975). A three-judge court declared invalid food stamp regulations which included as income a recipient's educational travel allowance but disallowed a deduction for the actual costs of transportation. Holding that the regulations conflict with the remedial purposes of the Act, the court stated:

> Under this record the travel allowance is spent entirely to defray commuting expenses. Therefore, receipt of such allowance has no effect on food purchasing power.

Id. at 405.

B. *Insufficient Record*

In addition, a more basic flaw underlies the entire regulation. In considering the challenge to HEW's selection of a $1200 figure as the proper exemption for a necessary automobile or the $2250 limitation placed upon family resources, we find ourselves unable to evaluate the reasonableness of these figures. Neither the notice of proposed rulemaking nor the Secretary's responses to comments in March and July of 1975 give any insight into the bases for these determinations. As we have noted previously, judicial review is meaningless where the administrative record is insufficient to determine whether the action is arbitrary and capricious.[11] *See, e.g., International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 628-47 (D.C. Cir. 1973); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849-51 (D.C. Cir. 1972). Even within the narrow scope of review mandated in this case, support for the Secretary's actions must appear in the record.

HEW alleges that the regulation represents a policy determination and therefore needs no supporting empirical data. We agree that the regulation does clearly express policy decisions to discourage buying on credit, to prevent accumulation of luxury items, to assure a difference between assets of working and welfare families, and to cut welfare costs. *See* 40 Fed. Reg. 30963 (1975). The choice of amounts of limitation, however, "turn[s] crucially on factual issues" and therefore requires "sufficient attention to these in the statement to allow the fundamental rationality of the regula-

[11] An adequate notice of proposed rulemaking serves, of course, an additional purpose. Alerting interested parties to relevant factors and empirical data allows the comment procedure to serve its intended goal. Parties informed of underlying considerations are far more apt to present informative, responsive comments.

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tions to be ascertained." *Amoco Oil Co. v. Environmental Protection Agency*, 501 F.2d 722, 740-41 (1974).

> The "basis and purpose" statement required by Section 4(c) of the APA must be sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted. In particular, the statement must advert to administrative determinations of a factual sort to the extent required for a reviewing court to satisfy itself that none of the regulatory provisions were framed in an "arbitrary" or "capricious" manner.

Id. at 739 (citations omitted). Judge J. Skelly Wright, author of the *Amoco* decision, has suggested that an adequate record for section 553 rulemaking will reflect "all of the relevant views and evidence considered by the rulemaker, from whatever source, and—like a mini-history—it must reveal if and how the rulemaker considered each factor. . . ." Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 395 (1974). In this case, the belated attempts by counsel to provide a basis for these choices cannot substitute for a sufficient record." *See, e.g., Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 395 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

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[15] These after-the-fact justifications are even more suspect in the case of the $1200 limit for a car. An affidavit submitted at trial indicated that this figure would permit the purchase of a three-year-old car. J.A. at 174. Affidavit of John A. Svahn, Acting Administrator of the Social and Rehabilitation Service Division of HEW. This affidavit was amended a few weeks later to state that when the regulation was actually promulgated in 1975, $1200 represented the price of a five-year-old car, rather than the three-year-old car it would have purchased in 1973 when the rulemaking was announced. *Id.* at 206.

For a regulation of this type to withstand judicial scrutiny, HEW must provide a more precise articulation of findings and relevant factors. Although some commentators have suggested that agency reconsideration in order to provide a satisfactory record may be of little benefit to a challenging party, *see Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 424-25 (1975), we are convinced that the three-step procedure of section 553, when properly applied, can provide an adequate basis for the substantive review mandated by the arbitrary and capricious standard.

> Step one of section 553 will yield the agency's initial proposal, its tentative empirical findings, important advice received from experts, and a description of the critical experimental and methodological techniques on which the agency intends to rely. Step two will produce the written or oral replies of interested parties to the agency's proposals and to all the other "step one" materials. And step three will furnish the final rule, accompanied by a statement both justifying the rule and explaining its normative and empirical predicates through reference to those parts of the record developed in steps one and two.

Wright, *supra*, 59 CORNELL L. REV. at 395.

V. CONCLUSION

For the reasons discussed above, we hold that, despite the Secretary's power to promulgate regulations regarding the manner of valuation and amount of permissible resources for AFDC recipients, the regulation challenged in this appeal is invalid. Valuing resources without regard to encumbrances violates the cardinal principle of AFDC that only resources actually available may be counted in determining whether the recipient is within the state's definition of a standard of need. Further-

more, review of the regulation is impossible because the promulgation consistently failed to articulate factual determinations underlying the decisions of the Secretary. For these reasons, we remand the case to the district court for the entry of a judgment declaring the regulation invalid. Injunctive relief does not appear to be required at this time. *Poe v. Gerstein*, 417 U.S. 281 (1974).

So ordered.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiffs,

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants.

PLAINTIFF'S SUPPLEMENTARY MEMORANDUM OF LAW IN SUPPORT OF THE MOTIONS FOR PRELIMINARY INJUNCTION AND CLASS CERTIFICATION AND IN REPLY TO DEFENDANT BERGER'S MEMORANDUM IN OPPOSITION TO THE MOTIONS

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PRELIMINARY STATEMENT

Plaintiff's arguments on the merits of her claim are set forth in PLAINTIFF'S MEMORANDUM OF LAW submitted in support of the Order to Show Cause. Plaintiff's claims, as set forth therein, are not seriously challenged by defendants. This Memorandum is submitted to address several inaccurate and irrelevant but diverting assertions made by defendant BERGER in his Memorandum of Law, ostensibly to confuse the singular and clear issue of law presented by plaintiff. Additionally, plaintiff wishes to call the Court's attention to the decision and order of the United States District Court, District of Minnesota in Johnson v. Likins, No. 4-75-Civ-318 (10/10/75), a decision of first impression in a case which presented the identical issue before this Court. Judge Larson has issued a preliminary injunction against enforcement of a Minnesota A.F.D.C. regulation which permits recoupment of agency caused overpayments from the 42 U.S.C. §602 (a)(8) income disregards. The Court determined that the regulation violated the Social Security Act. A copy of the decision and order are being filed with the Court as Exhibit "A" to this Memorandum. Finally, plaintiff will address H.E.W.'s position on the practice challenged in this suit.

RESTATEMENT OF THE CASE

Much of defendant BERGER's argument is directed to issues neither raised by plaintiff nor of any relevance to this case. Plaintiff wishes to clear the record as to these uncontested issues.

A) Plaintiff does not here challenge the authority of defendants to recoup by grant reduction in cases of fraudulent client caused overpayment. Nor does she contest agency caused or defendants' right to recoup/non-willful client caused overpayments when the recipient has excess actually available income, other than items exempted for these purposes.* Much of defendants' argument and the cases he relies upon argue these uncontested points.** Plaintiff, here, only challenges actions in recouping non-willful recipient caused and agency caused overpayments from the §602(a)(8) work incentive income disregards. Plaintiff contends that this income is not available for such recoupment purposes.

B) Plaintiff does not assert that a recoupment properly carried out pursuant to the challenged regulation

* At page 16 of his Memorandum, defendant refers to a Senate Finance Committee report. Aside from the fact that defendant fails to cite the report, it is clear that even if that Committee was aware of H.E.W.'s policy to permit recoupment from "other available income" they would have no reason to understand what income H.E.W. was categorizing as available. Rather it should be inferred that Congress having passed the disregard provision as the very heart of its new AFDC initiatives in work incentives would expect that the disregard income was sacrosanct.

** Defendant relies heavily on two cases, Lomax v. Lavine, Civil Action No. 72-Civ. 2457 (S.D.N.Y. 1972) and Jacquet v. Bonin, Civ. No. 72-2589 (E.D. La. 1975) both dealing with recoupment in fraud situations.

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will reduce the family's in hand income to below the statewide standard of need,* nor does she see as relevant, whether in a given instance all or only part of the income disregard is recouped. The provisions of 42 U.S.C. §602(a)(8) explicitly provide that as a work incentive AFDC recipients are allowed to retain some of their earnings so as to have more in hand income than non-working AFDC recipients and their families. Furthermore the Statute and the Supreme Court in Engelman v. Amos, 404 U.S. 23 (1971) both are explicit about the mandatory nature of the exemption pursuant to a definite "30 and 1/3 formula". If plaintiff's claims are incorrect the entire disregard may be recouped, if correct, not one penny may be touched for this purpose. Furthermore, plaintiff must point out that whether the disregard is recouped partially for a relatively longer period of time or completely for a relatively shorter period of time is irrelevant. In either case the entire recoupment is being made from what she contends is totally protected work incentive income.

* But see Note ** Page 27 and discussion at Pages 7-8 infra.

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POINT I

THE COURT IN JOHNSON v. LIKINS CORRECTLY DECIDED THE STATUTORY ISSUE IN THIS CASE

> Congress may judge that the income disregard work incentive is absolutely essential to the total AFDC program and may provide that the disregard of slightly over $1.00 in every $3.00 earned is the amount which shall be disregarded. There is a substantial probability that Congress has so provided and that disregard of only $1.00 of every $6.00 earned in cases of recoupment of agency - caused - overpayments contravenes the Congressional mandate. . . .
> Johnson v. Likins, supra at p. 32.

> That defendants herein . . . are further enjoined from enforcing any other agency policy of any kind whatsoever which would purport to authorize recoupment from disregard income in cases of agency error. Id. p. 40.

The Minnesota District Court in Johnson v. Likins, supra was asked to decide the issue before the Court in this case. The sole distinction in Johnson was that the Court was not presented with, nor did it decide, the issue with respect to client caused overpayments. (See page 32 opinion. Exhibit "A")

The Johnson decision beyond its weight as a decision

of "first impression",* on the issue presented here, is instructive for its clear and comprehensive treatment of the arguments set forth by both parties and for its explication of considerations heretofore unexplored by the parties.

The Johnson Court's Treatment Of the "Need" Factor

In various guises both the defendants in Johnson and defendants herein raise the issue that the disregard provides income in excess of "need" and is thus available and recoupable. Johnson makes clear that these assertions are without merit because it was the clear intent of Congress to provide the working recipient with income in excess of that which is received by non-working recipients. The essential inquiry must be whether the Congressional intent gives way to the State's interest in recouping an agency

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*Opinion page 26. The Court dismisses the decision in Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971), relied on by defendant, as uninstructive because it was undeniably premissed on the false assumption that the income disregard provisions were optional with the States rather than mandatory, as reaffirmed in Engelman v. Amos, 404 U.S. 23 (1971). Plaintiff would assign greater weight to Bradford because the language of the decision shows that the Court would probably have held that recoupment from disregarded income was prohibited had it realized that the disregard procedure was mandatory. See plaintiff's first Memorandum of Law, page 30. Furthermore, although it is evident that Johnson is a decision of "first impression" the case of Williams v. Lavine, 353 N.Y.S. 2d 340 (Sup. Ct. Nassau Co. 1974) states principles concerning the disregard which are essentially those stated by the Johnson Court and advanced by plaintiff herein. See plaintiff's first Memorandum of Law, pages 27-29.

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caused overpayment? Johnson answers in the negative. This must be so for many reasons.

First, the disregard was the heart of a new set of initiatives and goals in the AFDC program, i.e., to encourage employment as an alternative to total reliance on AFDC as a source of income. The Court analyzes this comprehensive package of work incentives and finds that they now hold equal prominence with the previously stated goal of the AFDC program, to provide for needy dependent children and their families. The disregard was thus interwoven with the need determination as evidence of Congress' new concern. Johnson makes clear that a States interest in recovering overpayments cannot justify the abandonment in whole or in part of the formula Congress prescribed to provide meaningful and effective work incentives.

Secondly, tying the disregard to the §602(a)(7) "need" determination has further significance. The State purports to recoup the disregard because it represents income in excess of "need". However, the "need" determination must be made with reference to §602(a)(7) and for the purposes of that section, §602(a)(8) disregard income does not reduce "need."* We are not dealing with entities which exist in a state of nature, but a statutory scheme to provide aid for

*Johnson opinion, page 29, para. 3.

the needy and encourage them to provide for themselves. The "need" definition and standards of "need" are legislated and must be treated in a consistent manner.

Furthermore, the Johnson Court points out the practical limitations on defendant's arguments to the effect that the challenged practice leaves plaintiff with at least her actual "need" pursuant to the Statewide standard. New York, like Minnesota provides an assistance payment identical to its "Statewide standard of need."* However, many other States provide only a percentage of the Statewide standard. Thus, in such a State, although a family's subsistence needs are determined to be $300 monthly only $180.00 might be provided, literally leaving the family to starve. In those States disregarded income may be the only means for the family to push its way towards a subsistence level of income. If recoupment of the disregard is permitted, it is permitted in all States. As the Johnson Court stated:

> The Court is interpreting a law which is equally mandatory or non-mandatory for all, and the Court should take cognizance of the broader ramifications of its interpretation. Accordingly, the Court is aware that if Minnesota is free to recoup from disregarded income in these circumstances, so is a State paying less than need. In such a State, disregard income may be the only resource which allows an AFDC family to rise to the level of minimum subsistence

*However, prior to January 1974 New York provided only 90% of its standard of need. See Rosado v. Wyman, 397 U.S. 397 (1970).

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> and recoupment from "excess" income might be recoupment from the mouths of hungry children. This Court is chary of inventing a principle which could be extended to allow such a recoupment.
> Johnson v. Likins, supra at p. 36.

The Johnson Court documents Congressional awareness of the "less than need" payment system which exists in many States and concludes.

> When Congress enacted 42 U.S.C. §602(a)(8) it had every reason to be aware that this would fulfill basic needs in many States, and the mandatory thrust of the statute may have been at least partially the product of such an awareness. To find recoupment from disregard income permissible might frustrate Congressional purpose not only regarding work incentives but regarding providing for the needs of dependent children as well.

This Court is no less faced with this added consideration, with perhaps greater meaning in New York, which prior to 1974 provided only 90% of need, and may well have to resort to a percentage payment again, due to its fiscal crisis.

Irreparability Of Harm

There is another respect in which the Johnson Court treated the "need" factor raised by defendants herein. Johnson held that although Minnesotra recipients of income disregards lived above the Statewide need standard, as in New York, they had acquired "legally protectable expectations" that they would receive the added income as Congress intended.

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The loss of such income through recoupment for prior overpayments created irreparable harm as a matter of law. See also Nelson v. Likins, 389 F. Supp. 123 (1975). The fact that they might regain the withheld income at some future time would not repair the harm. In the instant case there is no such mechanism to restore the lost income, and the harm is accentuated.

A final note is warranted concerning Johnson's treatment of H.E.W.'s position on the challenged practice. While it is clear that the Johnson Court was not aware of H.E.W.'s actual position with respect to the challenged practice, it is equally clear that the Court's decision was not grounded in the regulation. The Court in fact invites H.E.W. to make its views known.* The Court's decision was solidly based in its statutory analysis and it is clear that given that analysis it would have rejected H.E.W.'s position in identical terms to its rejection of the State regulation.

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* Opinion page 39.

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POINT II

H.E.W.'S POSITION ON THE CHALLENGED PRACTICE AND ITS VALIDITY

The actual position of H.E.W. on the practice challenged in this case has yet to be set forth by either party.

In fact, H.E.W. has taken the position that recoupment from the §602(a)(8) income disregards is permissible. H.E.W.'s position is wrong, for reasons shown here, in other parts of this Memorandum, and plaintiff's First Memorandum of Law.

Defendant's reliance on the terms of the regulation itself is misplaced, because on its face it does not permit the practice. The current H.E.W. regulation 45 C.F.R. §233.20(a)(12) was issued after the District Court for the District of Columbia invalidated H.E.W.'s recoupment regulation on statutory grounds in the case of N.W.R.O. v. Weinberger, 377 F.Supp 861 (1974). (As an aside N.W.R.O. is a first logical step in coming to the conclusion that H.E.W. has consistently misinterpreted the "Act" in this regard as well as other aspects of the AFDC program.) Because the newly promulgated regulation was silent on the issue of recoupment from the income disregard, several States raised questions concerning this. H.E.W. issued a clarifying letter to the States on August 10, 1974. A copy is submitted

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herewith as Exhibit "B". Although the clarification, like the regulation is ambiguously worded, consultation between attorneys for N.W.R.O. and H.E.W. indicated that H.E.W. allowed the practice challenged herein. LLOYD CONSTANTINE, Counsel for plaintiffs herein, was at that time, a staff attorney for the Center on Social Welfare Policy and Law, N.W.R.O.'s counsel, and thus was privy to the correspondence between H.E.W. and the State agencies. Furthermore, he is aware that N.W.R.O.'s counsel immediately objected to H.E.W. that its position on the income disregard was a violation of the "Act" and that H.E.W. having once had its regulation invalidated had merely substituted another statutorily invalid regulation, albeit defective in different respects.

The validity of H.E.W.'s position on the challenged practice must be assessed in light of its highly ambiguous regulation, the inconsistency of this position with other H.E.W. regulations dealing with the income disregard, the unreliability and vacillation evident in H.E.W.'s position on recoupment in general, and its atrocious record of reversal in the Federal Courts both as to its regulations and regulations in State plans which it had approved.

1. The Current Regulation

As shown above, H.E.W.'s intention to allow the practice challenged in this case is not manifest in its regulation. Defendants' reliance on 45 C.F.R. §233.20(a)

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(a)(12)(f)* to sanction the practice is misplaced, in that the cited section refers only to (a)(12)(1)(a)(2) recoupments in cases of fraud. While H.E.W. does intend to permit the practice, the wording of its regulation and the confusion it has created in the States and with Courts, mirrors its shaky and ambiguous approach to this issue.

2. The Inconsistency Of The Challenged Practice With Other H.E.W. Regulations Concerning The Income Disregard

H.E.W.'s position concerning the challenged practice conflicts with its treatment of the disregard in 45 C.F.R. §233.20(a)(3)(ii) which states:

> "45 C.F.R. §233.20 Need and amount of assistance.
>
> (a) Requirements for State Plans. A State Plan. . . must. . .
>
> * * *
>
> (3) Income and resources. . .
>
> * * *
>
> (ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:
>
> (a) in determining need, all remaining income and resources shall be considered in relation to the State's need standard;

* Defendant BERGER's Memorandum of Law page 14 paragraph 4.

(b) in determining financial eligibility and the amount of the assistance payment, all remaining income and resources may, at the State's option, be considered in relation to the State's need standard, or the State's payment standard;

(c) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their need as determined by the State's need standard;

(d) net income available for current use and currently available resources shall be considered. . . .

Effective date. These regulations were effective June 17, 1975." Federal Register, Vol. 40, No. 54, March 19, 1975.

(emphasis added)

First, "currently available" income is determined only "after all policies governing. . . . . disregard. . . . of income have been uniformly applied." The income disregard is here appropriately treated as not "currently available." To reconcile H.E.W.'s position with respect to the practice challenged in this case, with the cited regulation, one must dichotomize the concept of availability; treating the disregard as unavailable income for determining eligibility, need, and payment, but available income for recoupment. This means that the payment level must initially be computed without regard to §602(a)(8) money, but that same assistance payment may be lowered by then regarding §602(a)(8) income

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for recoupment. This compels the conclusion that the disregard is merely an accounting procedure. This approach is belied by the Statute, its legislative history and the Supreme Court's interpretation. A firm statement of Congressional purpose cannot be disposed of by accounting methods.

The need determination prescribed in §602(a)(7) of the "Act" is the essence of the AFDC program. Congress has explicitly interwoven the §602(a)(8) disregard into this determination and the States are without power to suspend the mandate of these sections for other purposes such as recoupment. The fallacy of characterizing the income disregard as unavailable in determining need and available for recoupment purposes, as defendants and H.E.W. have*, is manifested by defendants' misplaced reliance on King v. Smith,** 392 U.S. 552 (1970). Defendants correctly assert that King forbad the States from considering income, which was not actually available, in the need and assistance payments determinations. This decision grounded in §602(a)(7) proves plaintiff's point. The Court held that the income of the "substitute parent" was not available for §602(a)(7) (need determination) purposes because it was not actually available. The Court would not

* Defendants' Memorandum page 24, paragraph 2.

** Defendants' Memorandum page 29.

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have held that such income, unavailable for the need determination, would be available for recoupment purposes. Similarly the §602(a)(8) income which the "Act", the Supreme Court, and even defendants admit is unavailable for need determination, must also be unavailable for recoupment purposes--for in recoupment as well as any other procedure affecting the assistance payment, their is inextricably interwoven a need determination.

Secondly, H.E.W. has in fact admitted that the disregard is not exclusive of the assistance grant but an integral part of it. The July 10, 1974 H.E.W. letter (Exhibit "B") in clarification states:

> In this regard, please note that subsection (A)(1) [referring to §233.20(a)(12)(A)(1)] of the revised regulation is to be interpreted as though the words "exclusive of the current assistance payment" had been omitted. Thus, this provision does not authorize recoupment from net non-exempt income which has been considered in determining the welfare payment.

The intent of this clarification is clear, "net non-exempt income"* is exclusive of the current assistance payment but not available for recoupment, exempted disregarded income is part of the assistance grant but is also available for

* Income after the disregard and work expenses are deducted. This income reduces the AFDC payment dollar for dollar.

recoupment purposes.* This is all a logical absurdity, but must be adopted if H.E.W.'s conflicting treatments of the disregard are to be reconciled, and if the practice challenged in this case is to be sustained.

3. H.E.W.'S Position On Recoupment In General

While plaintiff does not, here, challenge other aspects of the H.E.W. recoupment policy, we would note that it has vacillated constantly since the advent of the income disregard in 1969, while the "Act" has not changed in its silence on recoupment. N.W.R.O. v. Weinberger, supra. is only one instance in which the H.E.W. recoupment policy or various State recoupment policy's approved by H.E.W. have been struck down by Federal Courts. We turn accordingly to H.E.W.'s atrocious record at interpreting the "Act."

4. H.E.W. Policy Has Been Consistently Invalidated By Federal Courts

Defendants make much of H.E.W.'s approval of its practice. However, the usual presumption in favor of the statutory interpretation of an agency entrusted with the administration of a statute must surely be carefully reassessed in light of H.E.W.'s consistent reversal by Federal Courts. The following cases are a small sample** of cases

* The disregard is most certainly part of the assistance grant and is interwoven into 42 U.S.C. §602(a)(7) which mandates the way that grants must be calculated.

** Time constraints permit only a listing of selected cases drawn from a deplorably greater group.

in which H.E.W. policy has been struck down either directly or by invalidating portions of State assistance plans approved by H.E.W.*: Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973); Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973) cert. denied, 417 U.S. 947; Lopez v. Vowell, 471 F.2d 690 (5th Cir. 1973) cert. denied, 411 U.S. 939; Rodriguez v. Vowell, 472 F.2d 622 (5th Cir. 1973) cert. denied, 412 U.S. 944 (1973); Rosen v. Hursch, 464 F.2d 731 (8th Cir. 1972); Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972); cert. denied, 411 U.S. 921 (1973); Wollfolk v. Brown, 456 F.2d 652 (4th Cir. 1972) cert. denied, 409 U.S. 885 (1972); Adens v. Sailer, 312 F.Supp. 923 (E.D. Pa. 1970); Alvardo v. Schmidt, 369 F.Supp. 447 (W.D. Wisc., 1974); Bass v. Richardson, 338 F. Supp. 478 (S.D.N.Y. 1971); Boisvert v. Zeller, 334 F.Supp. 403 (D.N.H. 1971); Brooks v. Yeatman, 311 F.Supp 364 (M.D. Tenn. 1970); Bueno v. Juras, 349 F.Supp. 91 (D. Ore. 1972); Burlingome v. Schmidt, 368 F.Supp. 429 (E.D. Wisc. 1973); Carver v. Hooker, 369 F.Supp. 204 (D.N.H. 1973) aff'd 501 F.2d 1244 (1st Cir. 1974); Doe v. Flowers; 364 F.Supp. 953 (N.D. W.Va. 1973) aff'd 94 S. Ct. 1921 (1974); Doe v. Hursch, 337 F.Supp. 614 (D. Minn, 1970); Doe v. Schmidt, 330 F.Supp. 159 (E.D. Wisc. 1971); Doe v. Shapiro, 302 F.Supp. 761

* All such state plans were approved explicitly or implicitly by H.E.W. in failing to invoke mandatory statutory sanctions. See 42 U.S.C. §604.

(D. Conn. 1969) appeal dismissed 369 U.S. 488 (1970); Doe v. Swank, 332 F.Supp. 61 (N.D. Ill. 1971) aff'd sub. nom, Weaver v. Doe, 404 U.S. 987 (1971); Francis v. Davidson, 340 F.Supp. 351 (D. Md. 1972) aff'd 409 U.S. 904; Gasaway v. McMurray, 356 F.Supp. 1194 (S.D.N.Y. 1973); Green v. Stanton, 364 F.Supp. 123 (N.D. Ind. 1973); Grubb v. Sterret, 315 F. Supp. 990 (N.D. Ind. 1970) aff'd 400 U.S. 922 (1971); Howard v. Madigan, 363 F.Supp. 351 (D. S.Dak. 1973); Jeffries v. Swank, 337 F.Supp. 1062 (N.D. Ill 1971); Townsend v. Swank, 404 U.S. 282 (1971); Meyers v. Juras, 404 U.S. 803 (1971); Carleson v. Remillard, 405 U.S. 598 (1972). The foregoing cases were decided on the grounds of invalidity under the Social Security Act. The following cases were decided on Constitutional grounds: McDonald v. Dept. of Public Welfare of State of Florida, 430 F.2d 1268 (5th Cir. 1970); Mothers and Children Rights Org. v. Sterret, 467 F.2d 797 (7th Cir. 1972); Anderson v. Burson, 300 F.Supp. 401 (N.D. Ga. 1968); Barnett v. Lindsay, 319 F.Supp. 610 (D. Utah 1970); Baxter v. Birkins, 311 F.Supp. 222 (D. Colo. 1970); Besaw v. Affleck, 333 F.Supp. 775 (D. R.I. 1971); Boucher v. Minter, 349 F. Supp. 1240 (D. Mass 1972); Bryson v. Burson, 308 F.Supp. 1170 (N.D. Ga. 1969); Caldwell v. Laupheimer, 311 F.Supp. 853 (E.D. Pa. 1969); Jen Cuk v. Brian, 355 F.Supp. 133 (N.D. Cal. 1972); Dews v. Henry, 297 F.Supp. 587 (D. Ariz. 1969); Rivera v. Dunn, 329 F.Supp. 554 (D. Conn. 1971); aff'd 404

U.S. 1054 (1972); Gaddis v. Wyman, 304 F.Supp. 717 (N.D.N.Y. 1969) aff'd sub nom. Wyman v. Bowens, 397 U.S. 49 (1970); Green v. Dept. of Public Welfare of Delaware, 270 F.Supp. 173 (D. Del. 1967); Griffin v. Richardson, 346 F.Supp. 1226 (D. Md. 1972) aff'd 409 U.S. 1069 (1973); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973); And in the most recent term of the Supreme Court, Philbrook v. Glidgett, 43 U.S.L.W. 4702 (1975) and Van Lare v. Hurley, 43 U.S.L.W. 4592 (1975). The foregoing list should provide some indication as to the reliability of H.E.W.'s interpretations of the welfare provisions of the "Act."

POINT III

DEFENDANT BERGER HAS IMPROPERLY ATTEMPTED TO UNDERMINE HIS OWN STATISTICS AND STUDIES CONCERNING THE PREVALENCE AND NATURE OF AGENCY CAUSED OVERPAYMENTS

In verified answers to plaintiff's first interrogatories, defendant BERGER, through his appointed agent, averred that the percentage of AFDC overpayments caused by agency error was 42%, for the most recent six month period. (Answer "3"). Defendant has also submitted the data sheet from his overpayment study of July - December 1974 indicating an agency caused overpayment rate of 43.1% (defendant's Memorandum of Law, Exhibit "G"). This study was previously submitted to the Court by plaintiff's attorneys in support of the class certification motion, as an indication of class numerosity.

Defendant BERGER has now procured the affidavits of PAUL KATZ, an employee of the defendant City Agency, in an attempt to erode the force of his own statistics concerning the prevalence and nature of agency caused overpayments.

In the first "Katz Affidavit" it is stated that:

> It should be noted that administrative errors in budget computations may not be the result of a worker's mathematical error. Incorrect budgets may also be due to failure of the client, with no fraudulent intent, to provide necessary information.

Relying solely on this naked, unsupported and vague specula-

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tion of one worker, employed by one income maintenance center, of only one of defendant's many local agencies throughout New York State, defendant Berger asserts that:

> Agency error encompasses far more than mere mathematical error; in many cases, errors resulting from incorrect information given by a client, or a client's failure to supply correct information will result in an error labelled as "agency caused".
> Defendant BERGER's Memorandum, p. 20. (emphasis in original)
>
> and
>
> As the Katz affidavits makes [sic] clear, many of these "agency caused" errors in fact do involve a non-willful failure of the client to supply necessary information in the above mentioned areas. This is illustrated by plaintiff's own situation, where budget error have resulted from her failure tc report the suspension of the Court Order pursuant to which her husband was making support payments, as well as from other causes.
> (BERGER Memorandum, page 22)

Let us address some of the more blatant inaccuracies in this reasoning. Although they are irrelevant to the issue presented, they are illustrative of the less than honest approach defendant has taken to this case and should be clarified so that they will not confuse the issue:

1) Preliminarily, it should be noted that defendant's attempt to explain away some agency caused overpayments as non-willfully client caused is without significance. The

class plaintiff seeks to represent are those who have received overpayments through agency error and non-willful recipient error. The parameters of the class are not defined merely by plaintiff's choice but inhere in the distinction which is made in the challenged State regulation and the H.EW. recoupment regulation. To wit, both 18 N.Y.C.R.R. § 352.31(d)(1)(ii) and 45 C.F.R. §233.20(a)(12) draw the line at willfully (fraudulently) induced overpayments, only permitting grant reduction to recoup these. Neither regulation distinguishes between nor permits reduction of the assistance payment to recoup nonwillfully induced nor agency caused overpayments.

2) The attempted shifting of agency error into the non-willful client error category is belied by defendant's own statistics, which break down client caused overpayments into willful and non-willful categories. See Answer "4" defendant BERGER's answers to plaintiff's first interrogatories. If defendant distinguishes willful and non-willful client caused overpayments, what is the basis of the assertion that some agency caused overpayments are in fact non-willful client caused? If this were true, why don't defendant's studies reflect this?

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*Recoupment from available income in excess of the grant is permitted regardless of the cause of the overpayment and this practice as a general policy is not challenged by plaintiff, who merely asserts that §602(a)(8) income is not available income for recoupment purposes.

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3) It is clear that the distinction in the Katz Affidavits, the sole authority for defendant's arguments referred to supra, are not merely speculations but clearly absurd ones on their face. Consider the defendant's own break-down of agency caused overpayments.

> In 72.1% of the cases, they resulted from a failure to take indicated action on available information concerning work program requirements, available income, and shelter costs.

HOW COULD THE RECIPIENT BE CULPABLE?

> In 19.5% of the cases, they resulted from an incorrect application of policy, including misinterpretation of the state and federal Work Incentive Program regulations and shelter costs.

HOW COULD THE RECIPIENT BE CULPABLE?

> In only 8.4% of the cases did the errors result from computational or transcription errors. (BERGER Memorandum, page.21.)

HOW COULD THE RECIPIENT BE CULPABLE?

Scrutinizing the alternative break-down of agency error offered by defendant at page 22 of his Memorandum, leads to a similar unavoidable conclusion that the types of error are those which clearly involve only agency error, characteristically a failure to properly obtain necessary information from a recipient or act on that information when supplied. The error committed in plaintiff's case is typical, wherein the income disregard was erroneously com-

puted by a welfare worker as $30 and 1/2 of gross income rather than the statutory $30 and 1/3. See "Katz affidavit" paragraph 2.*

It is both regrettable and incredible that defendant has chosen to make facts concerning plaintiff McGRAW, which in no way relate to the instant case, examples from which they argue. Regrettable because being outside the scope of the litigation they can only divert the Court or confuse the single issue presented. Incredible in that the agency has committed countless errors in the McGRAW case and continues to commit them, enshrining them in affidavits, causing added suffering to a beleaguered working mother and her family. Though plaintiff's counsel studiously avoided injecting these errors into his arguments, defendant having raised them, plaintiff is obliged to reply. Thus, the "Katz Supplemental Affidavit" states "Mrs. McGraw's budget, over the years has reflected many errors, caused both by agency error and a failure on her part to supply correct information." The affidavit, parotted in defendant's Memorandum, then states that Mrs. McGraw failed to inform the agency of the suspension of Court ordered support from her estranged husband.

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*The reference in the Katz affidavit and many of defendant's papers to a $15.00 and 1/3 income disregard reflects the practice of computing the grant on a semi-monthly basis. Thus the $30 monthly exemption becomes $15.00.

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The truth in this matter, which eventuated in gross AFDC underpayments, was that plaintiff brought the facts of non-receipt of support and agency overstating support received, to the attention of the agency and was forced to raise these as separate issues at the same fair hearing in which defendant BERGER applied the regulation challenged herein to plaintiff. Exhibit "C" submitted herewith is the transcript of this fair hearing. Counsel respectfully calls the Court's attention to the fair hearing decision (Exhibit "B" to the "McGRAW affidavit" in support of the Order to Show Cause) wherein defendant BERGER completely fails to deal with the issue of non-receipt of the support payment though duly raised and argued at the hearing. The resulting grossly deficient AFDC payments eventuated in Mrs. MCGRAW falling behind in her rent. Rent advancements were on two occasions provided by the agency to forestall eviction and these advancements are now being recouped. (Katz supplemental affidavit). Counsel upon reviewing Mrs. McGRAW's file and prior to the commencement of litigation was aware of all these errors in which both the State and City defendants were solely culpable, but reasoned that they would only confuse the Court and that administrative remedies would be sought.* However, now that they are raised by defendant, they provide a proper background for defendant's manufactured contentions concerning the nature

*Verified Complaint, paragraph 25.

of agency caused overpayments.

4) Beyond the specific allegations in the Katz affidavits, adopted in defendant BERGER's Memorandum, there is the more general question of the reliability of the information, both as a matter of law and common sense. As the District of Columbia Court of Appeals stated in its recent landmark decision: Rodway v. United States Department of Agriculture, 514 F. 2d 809, 816 (1975)

> First, courts have traditionally looked with hostility upon explanations of agency officials submitted in affidavit form during the course of litigation. These, "post hoc rationalizations" are typically found to be an inadequate basis for review. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419; Burlington Truck Lines v. United States, 371 U.S. 156, 168-169; SEC v. Chenery Corp., 318 U.S. 80, 87.

Apart from their inherently suspect nature, the Katz affidavits also defy the logic of the categories of data kept by defendant BERGER and the most instinctive bureaucratic norm, of understating error. If we are to believe the Katz affidavit, defendant regularly keeps overpayment statistics* which regularly overstate agency error. Many other assertions in defendant's Memorandum are similarly inaccurate, e.g., the statement on page 22 that "Recoupment from the earned

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*These statistics must be kept and reported to H.E.W. as part of a "quality control" program. See 45 C.F.R. §205.40.

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income disregard for agency caused errors follows only after a fair hearing." The fact is that fair hearings are requested in only 8% of the cases in which the City Agency intends to suspend, reduce, or discontinue a public assistance grant.* Failing this request the intended agency action is effectuated in a specified number of days without further advance notice.** Cataloguing similar mis-truths or half truths would have minimal utility, but those discussed should provide a proper perspective for weighing defendant's other assertions.

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*This statistic was revealed to plaintiff's counsel by the Bureau of Fair Hearings of the City Agency. Counsel has requested a copy of a report embodying this statistic and upon receipt of said document will file copies with the Court and the defendants.

**In the McGRAW case the Notice of Intent to recoup (Exhibit "A", McGRAW affidavit annexed to Order to Show Cause) called for complete suspension of the grant for 6 1/2 months. In this case the entire disregard would have been suspended and because the Agency had already committed other errors diminishing plaintiff's grant, the family would have been left with available income far below the standard of need, i.e., only $216.00 semi-monthly income for a family of 10 persons. This example points up the gap between the regulation as defendant BERGER describes it and the way it is being administered. Since Fair Hearings are requested in only 8% of these cases, this type of misapplication goes essentially unchallenged. Furthermore, it must be noted that defendant BERGER's fair hearing decision characterized the overpayment error as agency caused, the Notice sent to plaintiff merely stated she had been overpaid. A notice such as this will not alert the recipient to the nature of the error or the fact that she might seek relief from an improper recoupment action.

CONCLUSION

For all the foregoing reasons and for the reasons heretofore stated in plaintiff's first Memorandum of Law, plaintiff's motions for a preliminary injunction and class certification should be granted.

Respectfully submitted,

Dated: Brooklyn, New York
November 13, 1975

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On the Brief:

Gretchen L. Sprague

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,	
Plaintiffs,	
-against-	
STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,	75 Civ. 4682 (W.C.)
JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and	
THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,	
Defendants.	

MEMORANDUM OF LAW

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to a number of limitations. That regulation also required any state which recouped where agency error caused the overpayment to also correct prior underpayments.

Significantly, HEW made plain at this time its policy of considering income disregards as "available income", subject to recoupment, and distinct from current assistance payments:

> "(c) The plan may provide for recoupment from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payments or from both...."
> § 233.20(a)(12)(c).

Finally, in response to the order of the United States District Court for the District of Columbia in the case of NWRO v. Weinberger, 377 F. Supp. 861 (D.D.C., 1974), the Department promulgated the present regulation at 45 C.F.R. § 233.20(a)(12), 39 F.R. 22268 (June 21, 1974), along with a letter to the states further modifying that regulation. That order invalidated the existing regulation and prohibited HEW from promulgating any regulation permitting recoupment from current assistance grants where the recipient lacks income or resources available in the amount of the proposed reduction.

This new regulation left unchanged HEW's acknowledgement that income disregards were "available income", subject to recoupment and distinct from current assistance payments:

> "(f) Any recoupment of overpayments permitted by paragraph (a)(12)(1)(a)(2) of

> this section may be made from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payments or from both." § 233.20(a)(12)(i)(f).

Thus, implicitly since 1951, and explicitly since 1967 the Department has permitted recoupment of prior overpayments from "other available income". And, implicitly since the creation of the income disregards, and explicitly since 1973, HEW has considered recoupment of them, not as recoupment from current assistance payments, but as recoupment from other available income.

D. CONGRESSIONAL AWARENESS OF THE FEDERAL RECOUPMENT POLICY.

Although aware of HEW's recoupment regulations, Congress has failed to amend Title IV of the Social Security Act regarding recoupment, both generally and from income disregards, while amending the Social Security Act on numerous occasions.

As noted by Judge Cassibry in Jacquet v. Bonin, supra. at 9 , in 1972

> "Legislation was introduced in the United States Senate which included a provision specifically requiring recoupment of overpayments from the current assistance grants, even where the overpayment was not caused

ELIGIBILITY AUDIT REPORT

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POLICY AND LAW

File: _____

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NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES
1450 Western Avenue, Albany, New York 12243

Office of Audit and Quality Control

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[illegible] - SUMMARY ANALYSIS

July 1 - December 31, 1974

ADC CASELOAD

- Total ADC Payments - [illegible] million

  - Average monthly caseload - 327,843
  - Average case composition - 3.5 recipients
  - Average monthly payments - $314 per case

SAMPLE

1,309 cases selected for review for the period July through December, 1974.

- 1,207 cases reviewed
- 102 cases not reviewed

  - Duplicate cases; no payments; etc. . . . 78
  - Client moved out of State 10
  - Other reasons 4
  - Inconclusive Cases - referred to agency for appropriate action

    - Recipient refusal to cooperate . . 6
    - Unable to locate recipient 4

ERROR ANALYSIS

- INELIGIBILITY

  - 12.7% of ADC Caseload
  - 11.8% of ADC Expenditures
  - Total Ineligible payments - $74.1 million
  - Average monthly payment to ineligible case - $292

- OVERPAYMENTS

  - 29.6% of ADC Caseload
  - 9.9% of ADC Expenditures
  - Total Overpayments - $62.2 million
  - Average monthly Overpayment per Case - $105

- UNDERPAYMENTS

  - 18.6% of ADC Caseload
  - Deficiency in Grants Equivalent to 2.6% of ADC Expenditures
  - Total Deficiency in Payments - $16.3 million
  - Average monthly Underpayment per Case - $44

BEST COPY AVAILABLE

ADC - PRIMARY CASUAL FACTORS

ERROR ANALYSIS - TOTAL ADC CASELOAD

- INELIGIBILITY
  - Client errors - 10.3%
    - Dollar effect - $60.1 million
  - Agency Errors - 2.4%
    - Dollar effect - $14.0 million
- OVERPAYMENTS
  - Client Errors - 17.0%
    - Dollar effect - $35.4 million
  - Agency Errors - 12.6%
    - Dollar effect - $26.8 million
- UNDERPAYMENTS
  - Client Errors - 4.3%
    - Dollar effect - $3.8 million
  - Agency Errors - 14.3%
    - Dollar effect - $12.5 million

ADC INELIGIBILITY

CLIENT ERRORS

Summary

- Client errors - 81.1% of ineligible cases.

  - 9.6% of ADC expenditures
  - Dollar impact - $60.1 million
  - Willful misrepresentation of facts by the client - 94.4%

AGENCY ERRORS

Summary

- Agency errors - 18.9% of ineligible cases.

  - Dollar impact - $14.0 million
  - 2.2% of ADC expenditures

ADC INELIGIBILITY

AGENCY ERRORS

Summary

- Agency errors - 18.9% of ineligible cases.
  - 2.2% of ADC expenditures
  - Dollar impact - $14.0 million

Failure to Take Indicated Action

- 75.9% of agency errors attributable to failure to take action on available information.
  - Deprivation factor
    - Absent parent
    - Incapacity
    - Unemployment
  - Child dependency
  - WIN registration

Policy Incorrectly Applied

- 24.1% of agency errors related to incorrect application of policy.
  - Misinterpretation of State and Federal regulations regarding deprivational factor

INELIGIBILITY - AGENCY ERRORS

ERROR ANALYSIS

- Deprivation Factor Incorrectly Considered - 58.6%

  • Incapacity - 31.0%

    •• Medical documentation missing or outdated
    •• Recipient fully employed despite existence of incapacitating factor

  • Continued absence - 13.8%

    •• Allegedly absent father residing in household
    •• Return of allegedly absent father to the household

  • Unemployment - 13.8%

    •• Responsible head of household fully employed
    •• Receipt of UIB benefits

- Failure to Establish Eligibility of Dependent Children - 20.7%

  • Children left household
  • Children over age 21 in school
  • Children over 18 no longer attending school
  • Lack of documentation supporting family relationship

- Failure to Register Appropriate Recipient for Work Incentive Program (WIN) - 10.3%

  • Responsible head of household (no conditions of WIN exemptions existing)
  • Sole dependent child between 16-18 years of age and not enrolled in school

- Reported Income Omitted from Budget or Budgeted Incorrectly - 6.9%

  • Unemployment Benefits
  • Support Payments

- Need Requirements Overstated - 3.5%

  • Shelter Cost

INELIGIBILITY - CLIENT ERRORS

PROGRAM ELEMENTS AFFECTED

ERROR ANALYSIS

- Deprivation Factor Incorrectly Reported - 64.5%

  • Alleged absent parent found residing in household accounts for 62.9%

    •• Most costly type of error - Average of $312 per case
    •• Largest single factor of client errors
    •• Mainly found in urban areas

  • Unemployment no longer valid - 1.6%

- Change in Child Dependency Status Not Reported - 15.3%

  • Departure of dependent child from household
  • Child 16-18, not in school nor registered for WIN
  • Child over 18, not in school

    •• Living independently of family
    •• Living with other relative
    •• Placed in foster care or an institution

- Income Incorrectly Reported or Withheld - 12.1%

  • Employment earnings
  • Changes in earnings
  • RSDI and other benefits
  • Unemployment insurance
  • Voluntary support payments

- Available Resources Not Reported - 6.4%

  • Savings accounts

- Other Client Misstatements - 1.7%

  • Living in rent-free quarters
  • Non-PA members in household
  • WIN requirements

ADC OVERPAYMENTS

CLIENT ERRORS

Summary

- Client errors - 56.9% of overpayments.

  - 5.6% of ADC expenditures
  - Dollar impact - $35.4 million

AGENCY ERRORS

Summary

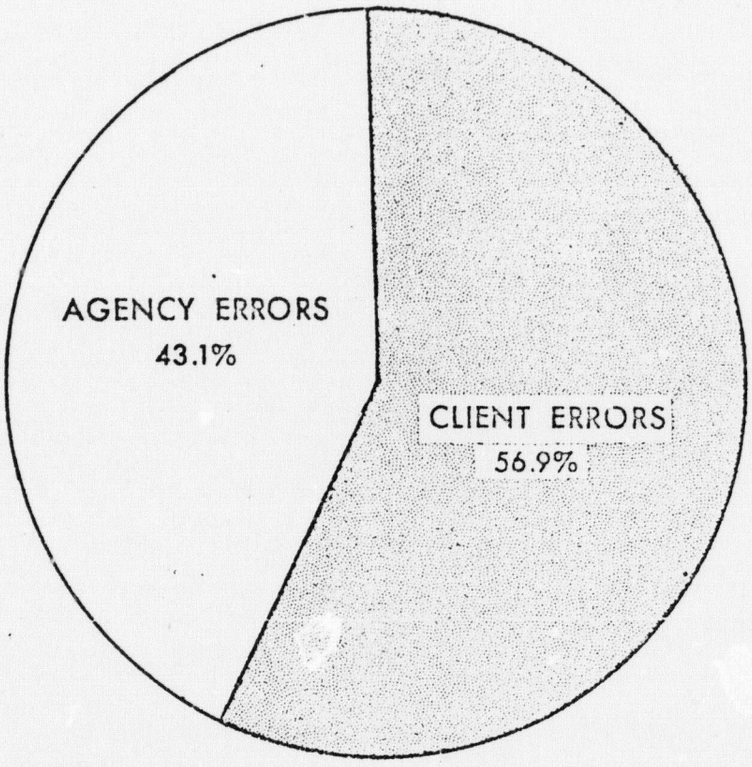
- Agency errors - 43.1% of overpayments.

  - 4.3% of ADC expenditures
  - Dollar impact - $26.8 million

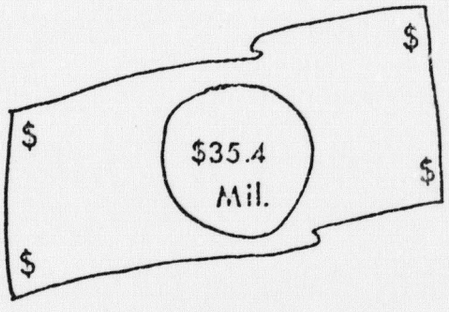
ADC OVERPAYMENTS - ANALYSIS OF ERRORS

JULY 1-DECEMBER 31, 1974

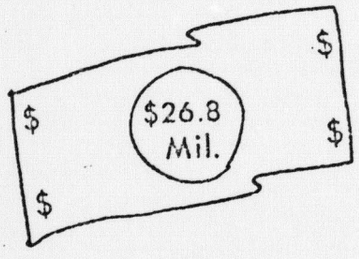
NEW YORK STATE



PROJECTED DOLLAR COSTS



CLIENT



AGENCY

ADC OVERPAYMENTS

AGENCY ERRORS

Summary

- Agency errors - 43.1% of overpayments.
    - 4.3% of ADC expenditures
    - Dollar impact - $26.8 million

Failure to Take Indicated Action

- 72.1% of agency errors attributable to failure to take action on available information.
    - Work program requirements
    - Available income
    - Shelter costs

Policy Incorrectly Applied

- 19.5% related to incorrect application of policy.
    - Misinterpretation of State and Federal regulations regarding WIN requirements
    - Shelter costs

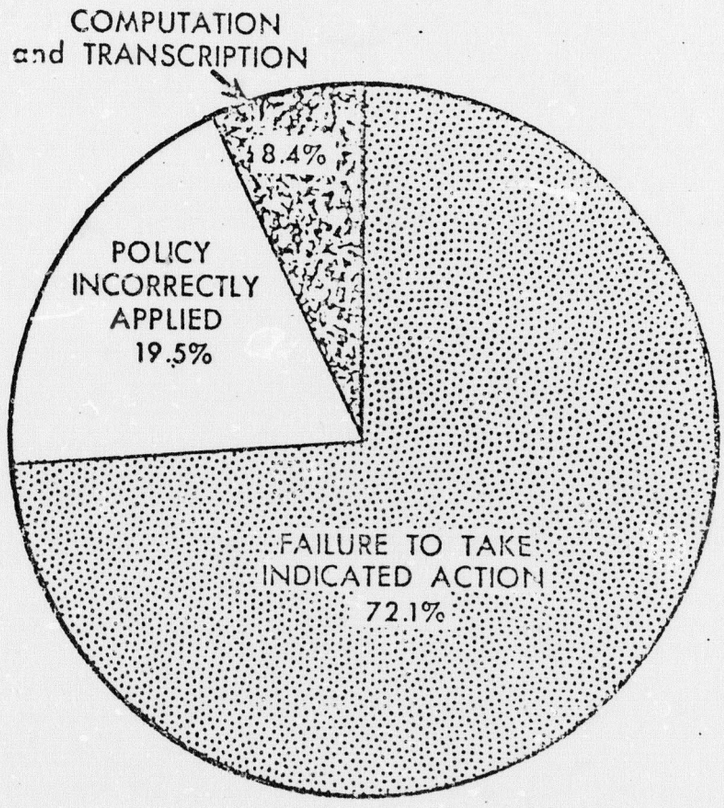
Computation or Transcription Errors

- 8.4% of agency error due to incorrect computation or transcription of budget information.

ADC OVERPAYMENTS - ANALYSIS OF AGENCY ERRORS

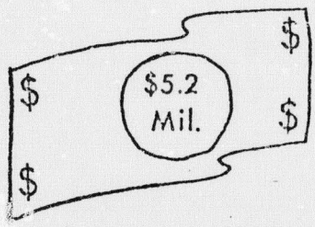
JULY 1-DECEMBER 31, 1974

NEW YORK STATE

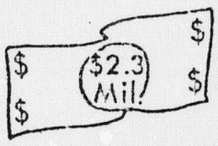


PROJECTED DOLLAR COSTS

FAILURE
TO TAKE
INDICATED ACTION



POLICY
INCORRECTLY
APPLIED



COMPUTATION
and
TRANSCRIPTION

OVERPAYMENTS - AGENCY ERRORS

ERROR ANALYSIS

- Reported Income Not Budgeted or Budgeted Incorrectly - 34.4%

    • Increased earnings
    • Voluntary support payments
    • SSI benefits

- Incorrect Compilation of Client's Budget - 27.9%

    • Proration of rent for non-PA member of household

        •• Non-related "friend" in household
        •• Child no longer eligible for inclusion in case
           Co-op SSI cases

    • Rent in excess of agency maximum
    • Allowance for fuel in "heated apartment"

- Failure to Register Appropriate Recipients for Work Incentive Program (WIN) - 26.0%

    • One or more member of case not screened

        •• Head of household employed to less than full capacity
        •• Children over 16-18, no longer attending school
        •• Unemployed head of household

- Dependent Child not eligible - 5.2%

    • Child 16 years old or older no longer attending school
    • Dependent child over 21 years of age
    • Lack of documentation supporting family relationship

- Incorrect assessment of deprivation factor - 3.9%

    • Incapacity terminated
    • Continued absence invalid

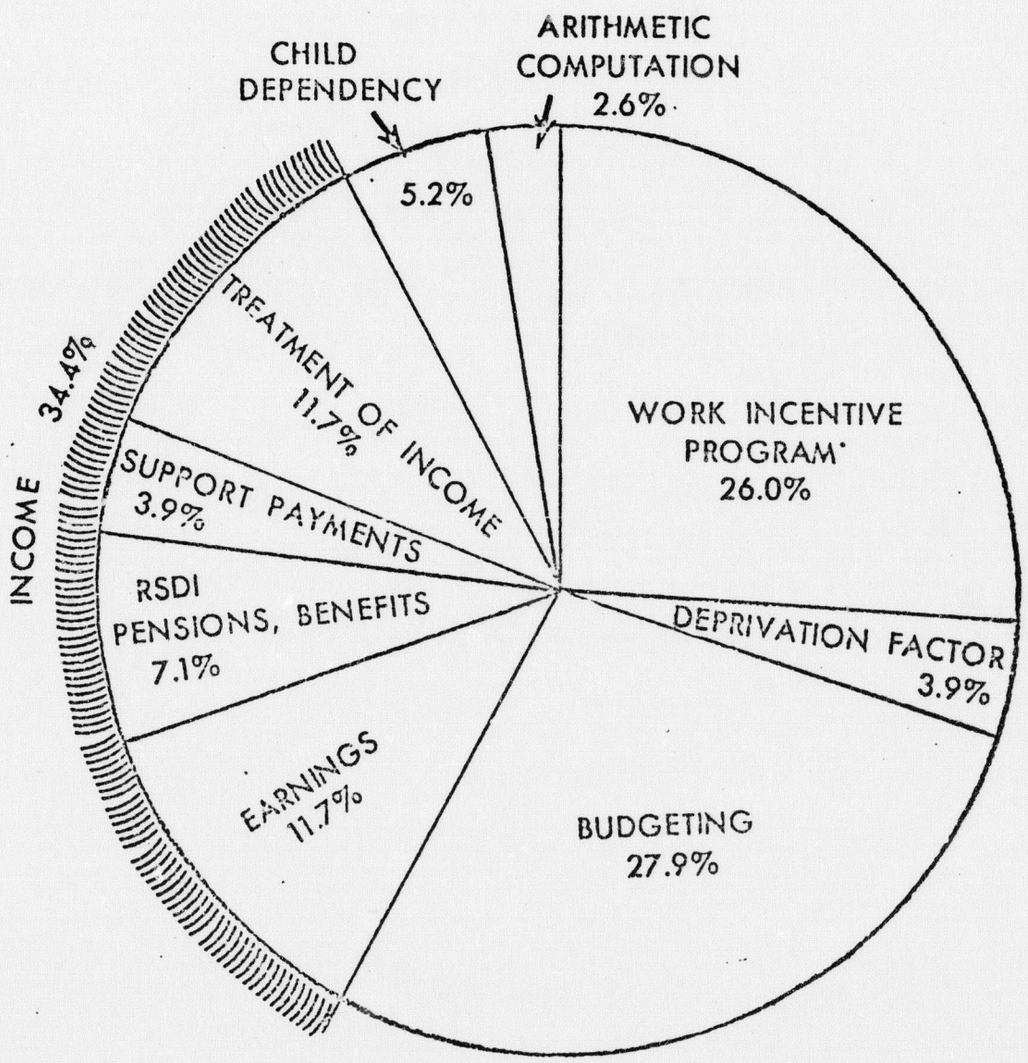
- Arithmetic Computation - 2.6%

ADC OVERPAYMENTS - AGENCY ERRORS

PROGRAM ELEMENTS AFFECTED

JULY 1-DECEMBER 31, 1974

NEW YORK STATE



OVERPAYMENTS - CLIENT ERRORS

PROGRAM ELEMENTS AFFECTED

ERROR ANALYSIS

- Income Incorrectly Reported or Withheld - 45.3%

  • Employment earnings
  • Changes in earnings
  • Support payments
  • Pensions and benefits

    •• OASDI
    •• Veteran's Administration
    •• Unemployment insurance
    •• Workman's compensation

  • Income received from relative or "friend"

- Incorrect Reporting of Budget Information - 28.1%

  • Non-PA member of household not reported
  • Shelter costs

    •• Rent less than reported
    •• Heat and utilities included in rent

- Allegedly Absent Parent Residing in Household - 14.8%

  • Father of one or more, but not all, dependent child(ren) found to be in the household

- Change in Child Dependency Status not Reported - 11.3%

  • Alleged dependent child not in household
  • Child 16-18, not in school nor enrolled for WIN
  • Child over 16, not in school

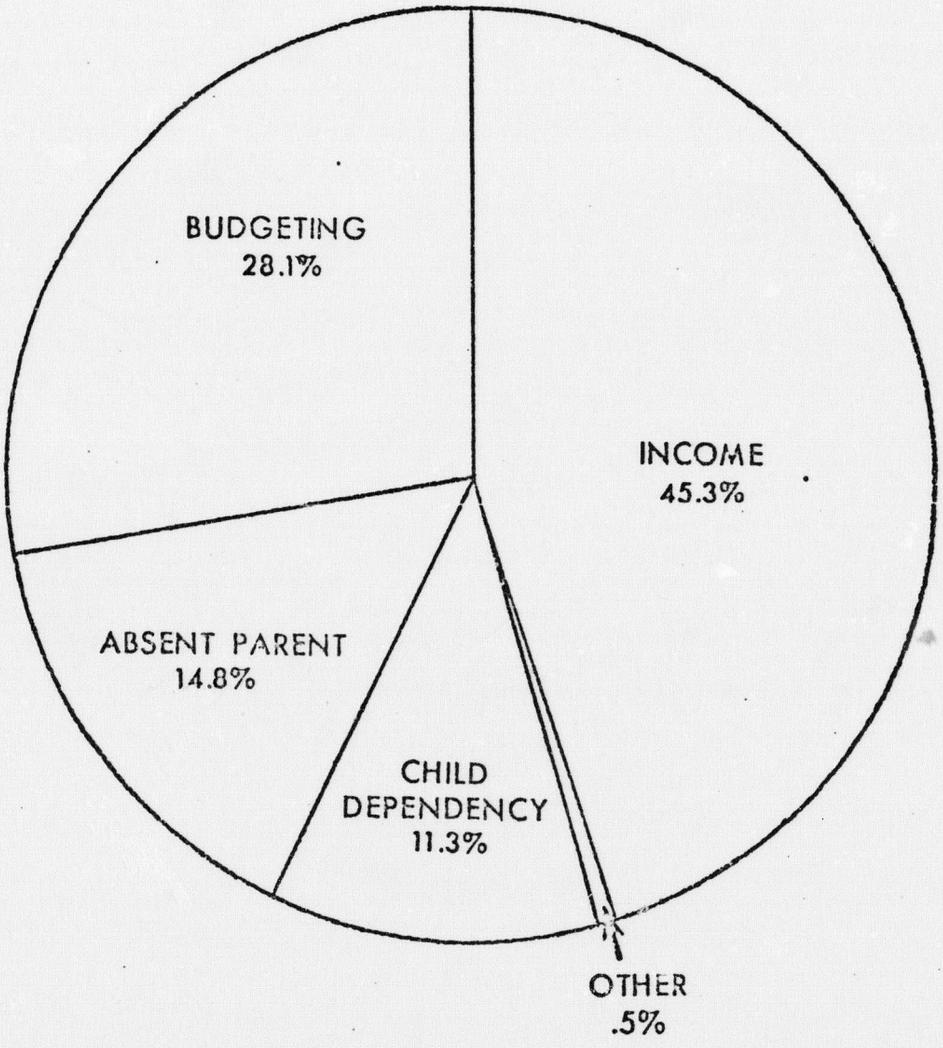
- Other - .5%

ADC OVERPAYMENTS - CLIENT ERRORS

PROGRAM ELEMENTS AFFECTED

JULY 1-DECEMBER 31, 1974

NEW YORK STATE



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